Supreme Court, U.S.
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In The
# Supreme Court of the United States

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OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
*Petitioner*

*v.*

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,
*Respondent*

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*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

To "promote competition and reduce regulation," Section 704(a) of the Telecommunications Act of 1996 preempts state and local land use and zoning decisions that have the "effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

Do state and local governments retain authority to prohibit construction of a wireless communications facility necessary to remedy a significant geographical gap in the provision of personal wireless services in the least intrusive manner, simply because a competitor already provides coverage in that area?

## RULE 29.6 STATEMENT

Omnipoint Communications Enterprises, L.P. is owned 99% by VoiceStream GSM II, LLC. VoiceStream GSM II, LLC is 100% owned by VoiceStream GSM II Holdings, LLC. VoiceStream GSM II Holdings, LLC is owned: (1) 50.1% by T-Mobile USA, Inc.; and (2) 49.9% by Omnipoint Investment L.L.C., which is a wholly-owned, indirect subsidiary of T-Mobile USA, Inc. T-Mobile USA, Inc. has its headquarters at 12920 S.E. 38th Street, Bellevue, Washington 98006.

T-Mobile USA, Inc.'s corporate parent is T-Mobile International AG & Co. K.G., which is the mobile communications subsidiary of Deutsche Telekom AG. Deutsche Telekom AG is the only publicly held company that owns 10% or more of Omnipoint Communications Enterprises, L.P. or any of its parent entities.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i
RULE 29.6 STATEMENT ..... ii
TABLE OF AUTHORITIES ..... iv
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
STATUTORY PROVISIONS INVOLVED ..... 1
STATEMENT ..... 2
A. The Telecommunications Act of 1996's Promotion of Personal Wireless Services ..... 2
B. Omnipoint's Application To Construct a Wireless Communications Facility ..... 3
C. Judicial Review of the Zoning Board's Actions ..... 5
REASONS FOR GRANTING THE PETITION ..... 9
I. The Court Should Resolve a Split as to the Scope of Preemption Under the Telecommunication Act's Prohibition of Services Provision, Which Deeply Divides the Circuits ..... 12
A. The Courts Are Split as to Viability of the "One Provider" Rule ..... 12
B. This Case Squarely Presents the Split in Authority ..... 15
II. This Recurring Federal Question Is of Exceptional Importance ..... 17
III. The Third Circuit Erred in Adopting the "One Provider" Rule ..... 20
CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### CASES

*Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158 (S.D. Cal. 2000) ..... 14, 24

*APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999) ..... passim

*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). 20

*AT&T Wireless PCS, Inc. v. Town of Porter*, 203 F. Supp. 2d 985 (N.D. Ind. 2002) ..... 15

*AT&T Wireless v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998) ..... 10

*Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003) ..... 4, 13, 19, 23

*MetroPCS, Inc. v. City & County of San Francisco*, 259 F. Supp. 2d 1004 (N.D. Cal. 2003) ..... 14, 15

*Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002) ..... 17

*Nextel Comm. of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F. Supp. 2d 311 (D. Mass. 2002) ..... 17, 24

*Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) ..... 14

*Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002) ..... passim

*SiteTech Group, Ltd. v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255 (E.D.N.Y. 2001) ..... 16

*Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) ..... passim

*Sprintcom, Inc. v. Mundelein*, 1999 WL 652032 (N.D. Ill. Aug. 20, 1999) ..... 17

*USCOCOF Virginia RSA#3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262 (4th Cir. 2003) ..... 11

*VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003) ..... 2, 11, 15

*Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230 (D.N.M. 1997) ..... 15

**STATUTES**

28 U.S.C. § 1254(1) ..... 1

47 U.S.C. § 253(a) ..... 16

47 U.S.C. § 332(c) ..... passim

Telecommunications Act of 1996, Section 704(a), Pub. L. No. 104-104, 110 Stat. 56 ..... passim

**OTHER AUTHORITY**

61 Fed. Reg. 40,348 (Aug. 2, 1996) ..... 18

64 Fed. Reg. 34,564 (June 28, 1999) ..... 18

Cellular Telecommunications & Internet Association, Mid 2003 Survey ..... 20

Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services* (2002), *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239> ..... 18, 19

H.R. Conf. Rep. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 4, 138 ..... 22

H.R. Rep. No. 104-204 ..... 2, 19, 21, 22

*In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844 (1995) ..... 22, 23

*In re Revision of Rules To Ensure Compatibility with E911 ECS*, 14 F.C.C.R. 10,954 (1999) ..... 18, 20

Mitchell A. Carrell & Robert B. Foster, *Railroad Tracks by Walden Pond: The Ongoing Struggle Between Towns and Providers Under the Telecommunications Act of 1996*, 33 Urb. Law. 781 (2001) ..... 24

Scott A. McLaren, et. al., *Telecommunications Act of 1996: Developments in the Ongoing Conflict Between Service Providers and Local Home Rule in the Facilities Siting Context*, 28 Real Est. L.J. 25 (1999) ..... 17

Stephanie E. Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002) ..... 3, 4, 14, 17

# PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals on sur panel rehearing, and Judge Rosenn's dissent, are reported at 331 F.3d 386. (App., *infra*, 1a-33a). The prior, vacated, opinion of the court of appeals, and Judge Sloviter's concurrence, are reported at 319 F.3d 627. (App., *infra*, 34a-52a). The opinion (including summary poem) of the district court, is reported at 189 F. Supp. 2d 258. (App., *infra*, 53a-73a).

A prior opinion of the district court, granting summary judgment to Omnipoint, is reported at 72 F. Supp. 2d 512. (App., *infra*, 74a-83a). The court of appeals' decision vacating that order and remanding the matter for trial is reported at 248 F.3d 101. (App., *infra*, 84a-98a).

## JURISDICTION

The opinion on sur panel rehearing was entered on June 4, 2003. (App., *infra*, 1a). A timely petition for rehearing *en banc* was denied on August 4, 2003. (App., *infra*, 99a-100a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 704(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, added the following to 47 U.S.C. § 332(c):

> [(7)](B) LIMITATIONS
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

> thereof--
>
> . . .
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

*Id.* § 332(c)(7)(B). The full text of 47 U.S.C. § 323 is reproduced in Appendix G to the petition (App., *infra*, 101a-111a).

## STATEMENT

### A. The Telecommunications Act of 1996's Promotion of Personal Wireless Services.

The Telecommunications Act of 1996 ("TCA") was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56. One of the technologies that the TCA promotes is wireless communication services. In regard to wireless services, "Congress found that 'siting and zoning decisions by non-federal units of government' had 'created an inconsistent and, at times, conflicting patchwork of requirements' that was inhibiting the deployment of wireless communications services." *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 828-29 (7th Cir. 2003) (quoting H.R. Rep. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61). The TCA sought to remedy this problem through a limited preemption of state and local land use authority. Specifically, in order to effectuate the TCA's national policy goals, the TCA provides that if a decision by a state or local planning body effectively prohibits the provision of wireless services, local law is preempted. 47 U.S.C. § 332(c)(7)(B)(i)(II); *see also Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002).

## B. Omnipoint's Application to Construct a Wireless Communications Facility.

Petitioner Omnipoint provides personal wireless communications services, including mobile telephone services. Omnipoint uses a wireless technology known as personal communications services ("PCS"). (App, *infra*, 4a, 75a) (3d Cir. App.[1] 498-99). PCS uses digital radio transmissions to provide wireless services. (App, *infra*, 4a, 75a). PCS is a significant improvement over analog "cellular" technology because it allows for the wireless transmission not only of voice data, but also video and text wireless communications. (*Id.* at 4a n.1; *see also* Stephanie E. Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641, 649 (2002) ("Unlike traditional cellular technology, PCS offers a huge range of potential services.")).

PCS facilities use low power radio signals to transmit voice and other data to, and from, handheld wireless devices. (App., *infra*, 4a, 75a). The PCS facilities also transmit data to, and from, telephone "land lines." (*Id.*). Wireless services depend entirely on the effective exchange of PCS signals between the handheld device and the wireless facility. (*Id.*) (3d Cir. App. 505-06). Omnipoint's PCS system uses an interconnected network of wireless communications facilities to ensure effective exchange of PCS signals. (App, *infra*, 4a) (3d Cir. App. 505-06). Each facility consists of an antenna and related equipment. (App., *infra*, 4a, 75a). The network is designed as a grid in which each wireless facility provides wireless coverage to a specific geographical area. (*Id.*) (3d Cir. App. at 505-06). Because PCS technology operates at a higher frequency than traditional cellular service, the coverage provided by a PCS facility is typically smaller, and

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[1] "3d Cir. App." refers to the Appendix filed with the court of appeals.

PCS providers therefore generally require a greater number of wireless facilities in order to provide seamless service. (App, *infra*, 75a n.1; Niehaus, *supra*, at 649 ("[W]hile PCS improves technology, it requires more and often taller antennas to operate properly."); *see also Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 415 (D. Vt. 2003)). When a wireless facility is not available to cover a specific area, customers who live, work, or travel through that area will either have no service or will suffer unreliable service, dropped calls, or an inability to connect to the PCS network. (App., *infra*, at 4a). These problems are referred to as a gap in service. A gap in service potentially affects both regular use and emergency 911 services.

Omnipoint and its affiliated entities bid for, and hold, an FCC license "to construct and operate radio transmitting facilities" within an area that encompasses Philadelphia, Pennsylvania; Wilmington, Delaware; and Trenton, New Jersey. (App., *infra*, 4a) (3d Cir. App. 432-33, 495-96).[2] Omnipoint, however, has a gap in its service in an area in the southeastern portion of Easttown Township, Pennsylvania. (*Id.* at 4a) (3d Cir. App. 509-12, 579-81). This area straddles Route 252, a major commuter highway, thereby increasing the negative impacts of this service gap. (App., *infra*, 75a) (3d Cir. App. at 174).

To address this significant geographical gap in its coverage, Omnipoint determined that it needed to construct a facility within the southern portion of Easttown Township. (App., *infra*, 4a, 75a) (3d Cir. App. at 111-12, 581). Its engineers identified a "search ring" within which the proposed facility would need to be located to fill the gap and directed its site acquisition specialists to search for an

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[2] Although Omnipoint and its affiliated entities hold the relevant license, the wireless service provider is Omnipoint's parent corporation, T-Mobile USA, Inc. For simplicity, the Petition ascribes the combined activities of both entities to Omnipoint.

appropriate site within that search ring. (3d Cir. App. at 111-12, 581).

Easttown Township had passed an Ordinance that limited the location of wireless facilities in its jurisdiction to areas zoned as a business district. (App., *infra*, 5a & n.3, 62a-65a, 75a-76a) (3d Cir. App. 285-86, 625-26, 677). It is undisputed that no site within a business district fell within the area necessary to remedy Omnipoint's gap in service. (App., *infra*, 7a n.8, 75a-76a) (3d Cir. App. at 285-88).

Omnipoint ultimately identified a suitable site on a portion of the land owned by the Or Shalom Synagogue, an active congregation located on Route 252. (App., *infra*, 75a). The Synagogue agreed to lease a small portion of the site to Omnipoint to construct a "stealth" facility. (*Id.*). The facility would consist of a 110-foot "flagpole" 24 inches in diameter at the base and tapering to 16 inches at the top. (*Id.*).[3] The antennae for the wireless facility would be concealed inside the "flagpole." (*Id.*).

On July 30, 1998, Omnipoint applied for the necessary variances to construct the facility. (*Id.* at 54a). A variance was necessary because the proposed site was not in the limited areas of the Township in which a wireless facility could be sited without a variance. (*Id.* at 5a, 75a-76a). As noted, it is undisputed that there were no sites available to fill the coverage that would not require a variance. The Easttown Township Zoning Hearing Board ("Zoning Board") denied Omnipoint's application on March 17, 1999. (*Id.* at 76a).

### C. Judicial Review of the Zoning Board's Actions.

Omnipoint sought judicial review of the Zoning Board's decision pursuant to the TCA, 47 U.S.C.

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[3] A wireless facility's antennae have a minimum effective height based on the topography and vegetation of the region, the amount of service area to be covered, and other factors. (App, *infra*, 4a).

§ 332(c)(7)(B)(v), and the Civil Rights Act, 42 U.S.C. § 1983. Omnipoint and the Zoning Board filed cross-motions for summary judgment. (App., *infra*, 75a). Omnipoint's motion sought summary judgment for two of its claims under the TCA: (1) the Zoning Board's decision had the "effect of prohibiting" the provision of wireless communication services; and (2) the decision was not supported by "substantial evidence." (*Id.* at 76a-78a). Omnipoint's motion also sought summary judgment on its claims that the Zoning Board's decision violated Omnipoint's due process rights under the U.S. Constitution and certain other rights guaranteed under the Constitution and laws of Pennsylvania. (*Id.* at 76a).

The district court granted Omnipoint's motion in part. (*Id.* at 82a-83a). It ruled that the Zoning Board's decision violated the TCA because it was not supported by substantial evidence. (*Id.*).[4] The district court declined to reach Omnipoint's other claims, and it ordered the Zoning Board to approve Omnipoint's application. (*Id.* at 82-83a, 85a).

Both parties appealed, and the court of appeals reversed the district court's judgment. It ruled that the district court's conclusion regarding the TCA's "substantial evidence" requirement rested on an error of law. (*Id.* at 95a). Like the district court, the court of appeals declined to reach the remaining TCA issues, finding that they would be better addressed after the parties had been given an opportunity to create a full evidentiary record. (*Id.* at 97a). It therefore remanded the case. (*Id.* at 98a).

On remand, the parties consented to have the case proceed before a Magistrate Judge and agreed to a bench trial. (*Id.* at 55a). At the conclusion of the trial, the court issued a published opinion in which it found that the "stealth flagpole" facility proposed by Omnipoint was "the least

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[4] The district court also granted the Zoning Board's cross-motion for summary judgment on Omnipoint's "unreasonable discrimination" claim (*id.* at 77a-78a n.3) and its due process claim (*id.* at 82a).

intrusive of all the alternatives." (*Id.* at 56a). The district court also found that Omnipoint had presented "evidence to establish its inability to construct a tower elsewhere or provide service in an alternative manner." (*Id.* at 57a). The court nonetheless concluded that the Zoning Board's decision to prohibit construction of the Omnipoint facility did not have the effect of prohibiting the provision of personal wireless services because Omnipoint's competitors already offered service in the relevant geographical area. (*Id.* at 61a). Relying on the "one provider" rule set forth in *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), the district court found that the existence of another provider who served the area prevented a finding that a significant gap existed from the perspective of wireless service users, and it therefore precluded, as a matter of law, the conclusion that Easttown Township's denial had the effect of prohibiting the provision of personal wireless services. (App, *infra*, 61a).

Omnipoint appealed the district court's decision. It devoted a substantial portion of its briefs to the argument that *Penn Township*'s "one provider" rule is contrary to the language, structure, purpose, and legislative history of the TCA. (*Id.* at 13a-14a, 50a). The first court of appeals opinion noted Omnipoint's attack on *Penn Township*,[5] and it agreed that a strict reading of the "one provider" rule set forth in *Penn Township* would "promote monopolization and thus conflict with the pro-competitive objectives of the TCA." (*Id.* at 41a). The panel therefore decided that the "one provider" rule was a misreading of *Penn Township*. (*Id.* at 38a-42a). Although the panel agreed that under *Penn Township* Omnipoint would need to show "more than that *it* was denied an opportunity to fill a gap in *its* service system," 196 F.3d at 480 (emphasis added), it decided that Omnipoint had nonetheless stated a claim that the Zoning Board decision

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[5] The panel noted that it lacked authority to overrule the decision of a prior panel. (App, *infra*, 14a).

had the effect of prohibiting the provision of wireless services. (*Id.*). The panel reasoned that the district court should have considered the effect that the Zoning Board's denial would have on *all* wireless customers who accessed wireless services in the relevant geographical area, including Omnipoint's customers. (*Id.* at 39a-41a).

The panel opinion conceded, however, that *Penn Township* contained the "somewhat puzzling" requirement that a claimant prove "that the area the new facility will serve is not already served by another provider." (*Id.* at 41a). The panel rejected a literal reading of that portion of *Penn Township* because it would violate the "procompetitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition." (*Id.* at 42a). As further support for its rejection of the "one provider" rule, the panel explained that such a rule would conflict with the Second Circuit opinion on which *Penn Township* purported to rely: *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999). (App., *infra*, at 41a-42a). The panel remanded the case for reconsideration in light of the legal standard it had announced. (*Id.* at 42a).

Judge Sloviter issued a concurring opinion. (*Id.* 50a-52a). She was concerned that the panel's opinion was not consistent with *Penn Township*. (*Id.*). She nonetheless voted to reverse and remand because the panel's decision gave the Zoning Board the opportunity to challenge Omnipoint's calculations regarding the number of persons denied wireless services. (*Id.* at 52a).

The Zoning Board filed a petition for rehearing en banc, in which it argued that the panel had not faithfully applied the *Penn Township* opinion. (*Id.* at 2a). The panel directed Omnipoint to file an answer to the petition. (*Id.*). On May 13, 2003, after considering the petition and the answer, the panel granted panel rehearing and vacated its

prior opinion. (*Id.*). On June 4, 2003, a divided panel ruled that its prior decision with respect to Omnipoint's effective prohibition claim had been in error. (*Id.*). The panel concluded that *Penn Township* required application of the "one provider" rule and because another provider offered service in the area, Omnipoint had no effective prohibition claim. (*Id.* at 20a-23a). The panel majority recognized the anti-competitive impact of its ruling, but reasoned that the "one provider" rule would be tempered by the TCA provision preempting state and local decisions that "unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I). (App., *infra*, at 21a-22a).

Judge Rosenn dissented. He noted that the majority's "one provider" rule had been explicitly rejected by the First Circuit's opinion in *Second Generation Properties*. (*Id.* at 28a-30a). He also reiterated that the panel majority's interpretation of *Penn Township* was at odds with the Second Circuit's opinion in *Willoth*, and he noted that the First Circuit shared his reading of *Willoth*. (*Id.* at 30a-31a).

Omnipoint timely petitioned for rehearing en banc of the panel's opinion on sur rehearing. On June 20, 2003, AT&T Wireless Services, Inc. and Cellco Partnership d/b/a Verizon Wireless moved for leave to appear as Amici Curiae in support of Omnipoint's petition for en banc review. The court granted their motion, briefly vacated that order, and then granted the motion again. The amicus brief explained the anti-competitive and public safety impacts of the Third Circuit's "one provider" rule and urged the Third Circuit to revisit the issue. The en banc court of appeals ultimately denied Omnipoint's petition on August 4, 2003. (*Id.* at 99a-100a).

## REASONS FOR GRANTING THE PETITION

This case raises an important, recurring question regarding the scope of the limited preemption provided by

Section 704(a) of the TCA, which has divided the courts. Section 704(a) provides that—in regulating the placement and construction of wireless communication facilities—a state or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). The circuits are divided as to the interpretation of this provision of the TCA. Specifically, the circuits disagree as to which group of wireless customers must suffer a gap in service before an effective prohibition of service has occurred under the TCA. The Third Circuit has adopted a "one provider" rule whereby a local or state government decision denying a permit for a wireless facility can never have the effect of prohibiting the provision of personal wireless services if at least one competing provider offers wireless service in the relevant geographical area. Thus, the fact that one provider's customers experience good service creates a bar to any effective prohibition of service claim. In contrast, the First Circuit, the Second Circuit, and a majority of district courts have rejected this "one provider" rule as contrary to the language and purpose of the TCA. Under their view of the TCA, a carrier can establish an effective prohibition claim upon a showing that its customers will experience a gap in effective service.

The circuits further disagree as to whether a prohibition of service claim can be stated without a showing of a blanket prohibition on construction of wireless facilities. The Fourth Circuit has held that a general ban or blanket prohibition on construction is required. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998).[6] The First, Second, Third, and Seventh

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[6] The Fourth Circuit has recently reiterated its holding in *Virginia Beach* that a provider "could not prevail in a challenge to an individual zoning decision absent a general ban or policy to reject all applications," but noted that one of its subsequent opinions recognized "the theoretical possibility" that actions other than a general ban could amount to a

Circuits have rejected that Fourth Circuit holding. *See, e.g., USCOCOF Virginia RSA#3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 n.6 (4th Cir. 2003) (explaining the Second and Third Circuits' interpretation of the TCA); *VoiceStream Minneapolis, Inc.*, 342 F.3d at 834-35 (rejecting the Fourth Circuit's holding in *Virginia Beach* and adopting the First Circuit's interpretation of the TCA).

The issue presented is also a recurring federal question of critical importance to the burgeoning wireless telecommunications industry, which, by itself, justifies this Court's review. As wireless communications have assumed a greater role in the United States' communications infrastructure,[7] and as providers seek to ensure nationwide coverage for their existing and new services, "effect of prohibiting" claims have become commonplace. The splits in authority identified above have created significant uncertainty for the courts who interpret § 704(a) of the TCA and for the litigants who seek to conform their behavior to its requirements. That uncertainty has led to negative impacts on the implementation of new wireless technologies—including enhanced 911 emergency services that allow responders to ascertain the precise location and telephone number of the caller—and diminished competition in the marketplace for wireless services. These outcomes directly undermine the two seminal goals of the TCA: (1) the rapid introduction of new technologies; and (2) increased competition for telecommunications services. 110 Stat. at 56.

Finally, the text, history, and purpose of the TCA demonstrate that the Third Circuit's "one provider" rule is in error. This, too, justifies review. In short, every factor that the Court usually considers when deciding whether to grant a writ of certiorari applies here, and each demonstrates that the Third Circuit's decision warrants review.

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prohibition of service. *USCOCOF Virginia RSA#3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003).

[7] *See infra* pp. 19-20.

## I. The Court Should Resolve a Split as to the Scope of Preemption Under the Telecommunication Act's Prohibition of Services Provision, Which Deeply Divides the Circuits.

### A. The Courts Are Split as to Viability of the "One Provider" Rule.

The Third Circuit's "one provider" rule conflicts with decisions of the First and Second Circuits. The First Circuit made clear its rejection of the "one provider" rule in *Second Generation Properties*. 313 F.3d at 632 (noting that the issue had "divided the courts" and refusing to adopt the Third Circuit's rule).[8] Judge Lynch's opinion for the court addressed the Third Circuit's reasoning at length and concluded that, contrary to the Third Circuit's purported focus on the consumer, the "one provider" rule:

> [W]ould be highly problematic because it does not further the interest of the individual consumer. [I]t is of little comfort to the customer who uses AT&T Wireless (or Voicestream, Verizon, Sprint, or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap. Of course, that AT&T customer could switch to Cingular Wireless. But were the rule adopted, the same customer might well find that she has a significant gap in coverage a few towns over, where AT&T Wireless, her former provider, offers service but Cingular Wireless does not. The result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving

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[8] *See also MetroPCS, Inc. v. City & County of San Francisco*, 259 F. Supp. 2d 1004, 1013 (N.D. Cal. 2003) (citing the "circuit split" between the First and Third Circuits).

> the industry toward a single carrier. When Congress enacted legislation to promote the construction of a nationwide cellular network, such consequence was not, we think, the intended result . . ."

313 F.3d at 633.

The First Circuit also rejected the Third Circuit's conclusion that the TCA's "unreasonable discrimination" provision, 47 U.S.C. § 332(c)(7)(B)(i)(I), "would adequately address situations where customers of some but not all carriers lack service in an area." *Second Generation Properties*, 313 F.3d at 634. It explained that "the law from other circuits gives little reason to think this clause will effectively safeguard congressional efforts to promote the building of a nationwide cellular network." *Id.* at 634. Specifically, the First Circuit noted that other circuits had allowed discrimination against permit applications based on "different aesthetic or safety ramifications" and "different structure, placement or cumulative impact." *Id.* at 635.

The Third Circuit's "one provider" rule also conflicts with the Second Circuit's construction of the TCA in *Willoth*, 176 F.3d at 630. In *Willoth*, the Second Circuit ruled that "local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.* at 643. The court went on to say that "once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader. State and local governments may deny subsequent applications without thereby violating [the prohibition of services provision]." *Id.* The First Circuit, and a majority of district courts within the Second Circuit, have restated this holding as follows: "[O]nce a carrier has adequate (though less than perfect) service in an area, local boards can deny applications by that carrier for additional towers without violating the effective prohibition clause." *Second Generation Properties*, 313 F.3d at 633 n.13 (emphasis added) (citing *Willoth*, 176 F.3d at 643); *Independent Wireless One Corp.*, 242 F. Supp. 2d at 419-20 (adopting the First Circuit's reading of *Willoth*); *see*

*also Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1195-96 (W.D.N.Y. 2003) (construing *Willoth* as requiring an inquiry into the means Nextel proposed to fill service gaps its customers experienced).[9]

The Third Circuit, however, used *Willoth* to support its "one provider rule." Even though *Willoth* did not address competing service providers, the Third Circuit has erroneously interpreted *Willoth*'s reference to "subsequent applications" as competitors' applications rather than subsequent applications by the provider who already provides sufficient service. (App., *infra*, at 16a-18a). That construction is untenable in light of the language of the TCA and the unambiguously-stated Congressional intent, and it creates a split of authority between the Third and Second Circuits. *See generally* Niehaus, *supra*, at 668 (noting that the Third Circuit "purported to agree with *Willoth* generally, but gutted the [S]econd [C]ircuit's standard").

District courts outside of the First, Second, and Third Circuits are similarly split as to the "one provider" rule. For instance, district courts in the Ninth Circuit have reached contradictory conclusions. *Compare MetroPCS, Inc. v. City & County of San Francisco*, 259 F. Supp. 2d 1004, 1013 (N.D. Cal. 2003) (examining the First and Third Circuits' analyses and finding "the First Circuit position more persuasive"), *with Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1167 (S.D. Cal. 2000) (adopting the Third Circuit's "one provider" rule). A district court in the Seventh Circuit (whose opinion was issued before *Second Generation Properties*) adopted the "one provider" rule and held that AT&T Wireless PCS could not prove a violation of the TCA's prohibition of services provision because other carriers provided service in the area. *AT&T Wireless PCS, Inc. v. Town of Porter*, 203 F. Supp. 2d 985, 1001 (N.D. Ind.

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[9] One district court in the Second Circuit has adopted the Third Circuit's reading of *Willoth*. *SiteTech Group, Ltd. v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255, 263-65 (E.D.N.Y. 2001).

2002). In contrast, an earlier opinion by a district court in the Tenth Circuit rejected the "one provider" rule and held that the zoning authority had effectively prohibited the provision of wireless communications services—even though an existing provider offered "functionally equivalent services"—because the denied facility would have offered PCS, rather than cellular, service to the area. *Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230, 1238 (D.N.M. 1997).

**B. This Case Squarely Presents the Split in Authority.**

This case arises on a complete factual record that properly frames the question presented and ensures its effective review. As noted above, all circuits but the Fourth have held that land use decisions short of a general ban on wireless facilities can have the effect of prohibiting the provision of personal wireless services. Those circuits—the First, Second, Third, and Seventh—use two similar, but differently-worded, interpretive tests to determine whether a land use decision denying permission to construct a wireless facility has the effect of prohibiting the provision of personal wireless services. In the Second and Third Circuits, the applicant must show that the gap in service cannot be closed through less intrusive means. *Willoth*, 176 F.3d at 643; *Penn Township*, 196 F.3d at 480. In the First and Seventh Circuits, the applicant must show that it explored viable alternative facilities more palatable to the permitting authority, but those facilities would not solve the coverage problems faced by the applicant's customers. *Second Generation Properties*, 313 F.3d at 635; *VoiceStream Minneapolis, Inc.*, 342 F.3d at 834-35. The district courts outside of the First, Second, Third, and Seventh Circuits have either adopted one of these two tests or attempted to synthesize them. *See, e.g.*, *MetroPCS*, 249 F. Supp. 2d at 1014-15 (reconciling the competing requirements by requiring the provider "to demonstrate its

proposed solution is the most acceptable option for the community in question."). It is not clear whether these various interpretive tests differ in any meaningful way. *See Second Generation Properties*, 313 F.3d at 630 n.9 (declining to address the differences between the Second/Third Circuit rule and First/Seventh Circuit rule).

In several cases, however, an applicant's failure to satisfy one of these interpretive tests has complicated effective review of the "one provider" rule. *See, e.g.*, *Second Generation Properties*, 313 F.3d at 635 (rejecting the "one provider" rule but finding no prohibition of service because unexplored, viable alternatives existed to the proposed wireless facility); *SiteTech Group, Ltd.*, 140 F. Supp. 2d at 263-65 (adopting the "one provider" rule but finding "in any event" that plaintiffs did not establish that their application was the "least intrusive means" or "only feasible plan").

Here, however, the district court found that Omnipoint's stealth flagpole was the least intrusive of the possible alternatives and that Omnipoint had "present[ed] evidence to establish its inability to construct a tower elsewhere or provide service in an alternative manner." (App., *infra*, at 57a; *see also id.* at 54a (explaining that the opinion constitutes the Magistrate Judge's findings of fact)). These findings were affirmed on appeal. (*Id.* at 6a-7a). Thus, the factual record ensures that the split in authority regarding the "one provider" rule is squarely presented for review regardless of which of these interpretive tests, if any, this Court selects.[10]

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[10] Review of the "effect of prohibiting" provision at issue in this case will likely assist federal and state courts in resolving uncertainty as to the preemptive scope of another provision in the TCA: 47 U.S.C. § 253(a). That provision, which proscribes state and local actions that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," is said to "mirror[] the language and intent" of § 332(c)." Scott A. McLaren, et. al., *Telecommunications Act of 1996: Developments in the Ongoing Conflict Between Service Providers and Local Home Rule in the Facilities Siting*

## II. This Recurring Federal Question Is of Exceptional Importance.

Besides raising an issue that implicates a clear split of authority, the petition addresses a frequently recurring federal question that is exceedingly important. This, by itself, supports this Court's review. The question presented has become commonplace in the federal courts. As the First Circuit recently explained, "[t]he federal courts now routinely hear cases brought under the [TCA] by those who wish to construct cellular antenna towers and have been denied permission to do so by local town officials." *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 17 (1st Cir. 2002). These cases "almost always" involve a claim that the local government's decision had the effect of prohibiting wireless service. Niehaus, *supra*, at 644 (noting that the "prohibition of service" provision "is almost always implicated in litigation springing from attempt to fill significant gaps in coverage").

This recurring question is also one of great practical importance. For example, gaps in wireless service present potentially significant public safety impacts. Over one-third of all 911 calls are made from wireless phones. Dale Hatfield, *Report on Technical and Operational Issues*

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*Context*, 28 Real Est. L.J. 25, 27 n.10 (1999). In fact, litigants have alleged violations of both sections arising from the same alleged prohibition of service. *See, e.g., Sprintcom, Inc. v. Mundelein*, 1999 WL 652032, at *3 (N.D. Ill. Aug. 20, 1999) (recounting that plaintiffs brought claims under both sections when the Village Board denied their applications for variances and a special use permit). At least one court has treated the provisions as substantially similar in scope and effect. *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F. Supp. 2d 311, 319-20 (D. Mass. 2002) (addressing plaintiff's Count II—regarding § 332(c)—and Count III—regarding § 253(a)—under the single heading "Effective Prohibition," without distinguishing between the two counts).

*Impacting the Provision of Wireless Enhanced 911 Services*, at 15 (2002), *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239>. Moreover, the growth in personal wireless services has led to numerous subscribers discontinuing land-line service and a dramatic reduction in the number of pay phones, which in turn places a premium on "seamless, ubiquitous and reliable" personal wireless systems as a means of providing 911 services. *Id.* at 7. The FCC has recognized that "one reason access to emergency 911 systems is not always available for wireless handsets is that there are gaps in the signal coverage provided by wireless carriers." *In re Revision of Rules To Ensure Compatibility with E911 ECS*, 14 F.C.C.R. 10,954, 10,961 ¶ 14 (1999). The FCC further stated:

> The failure to deliver 911 calls because of coverage gaps can contribute to tragic outcomes in these emergency situations. The record strongly indicates that one specific step the Commission can take in the interest of public safety is to improve wireless call completion, especially in rural areas, and thus to facilitate more efficient and rapid emergency response.

*Id.* at 10,962-63 ¶ 19.

The FCC has mandated that all wireless providers develop enhanced 911 services to ensure that wireless phone users can reach 911. *See* 61 Fed. Reg. 40,348 (Aug. 2, 1996) (summarizing FCC Report and Order, No. 96-264, July 26, 1996); 64 Fed. Reg. 34,564 (June 28, 1999) (summarizing FCC Second Report and Order, No. 99-96, May 13, 1999). These FCC regulations are proceeding in phases, and they will culminate in an "enhanced 911" system that can closely determine the geographical location of any wireless user who dials 911. When a wireless provider such as Omnipoint cannot serve a given geographical area, and when other compatible systems offer inadequate service, customers who reside, work, or travel through that area may be unable to

access the enhanced 911 system in the event of an accident or emergency.[11]

The "one provider" rule also results in significant anti-competitive effects in the personal wireless services marketplace. In doing so it undermines a prime purpose of the TCA and thereby harms consumers through the poorer service, higher costs, and inferior technology that arise from an anti-competitive system. Indeed, the TCA's legislative history contains the House of Representatives' finding that "it is in the national interest that uniform, consistent requirements . . . be established as soon as possible. Such requirements . . . will speed deployment and the availability of competitive wireless communications services which will ultimately provide consumers with lower costs as well as with a greater range and options for such services." H.R. Rep. No. 104-204, *reprinted in* 1996 U.S.C.C.A.N. 10, 61. Numerous courts have recognized the anti-competitive impacts of the "one provider" rule. Such anti-competitive impacts impede the achievement of the goals—lower costs and greater options for consumers—Congress sought to achieve. *See, e.g.*, *Second Generation Properties*, 313 F.3d at 633 (noting that the "crazy patchwork quilt of intermittent coverage . . . might have the effect of driving the industry toward a single carrier."); *Independent Wireless One Corp*, 242 F. Supp. 2d at 420 ("If the fact that a provider or providers have coverage in an area is sufficient reason to

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[11] Enhanced 911 systems are important because "many callers are unable to provide their location at all, either because they do not know themselves, are physically unable to speak, or are under duress. In these cases, dispatching first responders becomes very difficult, resulting in loss of life and/or property." Hatfield, *supra*, at 15. In addition, many municipalities are developing "reverse 911" systems. These allow the municipality to communicate directly with residents in the event of a major emergency. As applied to wireless technology, these reverse systems would allow a municipality to forward text messages to PCS phones to inform users of accidents or impending disasters. As discussed, *infra* p.20 n.12, not all cell carriers have compatible systems.

deny an application by a new provider . . . the existing companies will have a monopoly on the area . . . .").[12] In light of these serious practical impacts created by the "one provider" rule, the Court should not delay in resolving the question presented.

Finally, the problems created by the Circuit split are likely to increase over time. The number of subscribers using cellular telephones is continuing to increase as are the number of cellular facility sites. *See* Cellular Telecommunications & Internet Association, Mid 2003 Survey, *available at* <www.wow-com.com/pdf/MidYear_2003_survey.pdf>.

## III. The Third Circuit Erred in Adopting the "One Provider" Rule.

The Third Circuit erred in holding that Omnipoint could not demonstrate that the Zoning Board had effectively prohibited the provision of personal wireless service. Its ruling departs from the text, legislative history, and purpose of the TCA. While the Third Circuit's error is perhaps not surprising in light of the TCA's lack of clarity,[13] this, too, justifies review.

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[12] Roaming is rarely a viable substitute for coverage by the customer's provider. Few providers have entered into agreements that allow their customers to roam to another provider's equipment while that customer remains within the primary provider's network. And even when such "in market" roaming agreements are in place, the technological barriers to roaming are significant because mobile phones use at least four incompatible technologies and two incompatible bands. Indeed, the FCC has explained that, except in limited circumstances, subscribers of one provider generally cannot receive service through the facilities of another provider. *See generally In re Revision of Rules To Ensure Compatibility with E911 ECS*, 14 F.C.C.R. at 10,954-76 ¶¶ 3, 6, 21-26 & n.31, 35 n.47 (1999) (explaining incompatibilities in mobile technology formats and the resulting difficulties in using another carrier to access wireless services).

[13] *See generally Willoth*, 176 F.3d at 641 (reiterating this Court's statement in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 397

Section 704(a) of the TCA added the following to 47 U.S.C. § 332(c):

> [(7)(B)](i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> . . .
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

*Id.* § 332(c)(7)(B). The text is vague with respect to the question presented, but the "straightforward reading is that 'services' refers to more than one carrier." *Second Generation Properties*, 313 F.3d at 634. Thus, the Act contemplates that the existence of "one carrier [who] provides some service in a geographical gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers." *Id.* Moreover, the phrase "have the effect of prohibiting" extends beyond decisions that result in a blanket ban on wireless facilities, and instead appears to "reach certain situations in which there is some coverage in a gap." *Id.*

The legislative findings and history confirm that the "one provider" rule is an erroneous interpretation of the TCA. Congress found that "siting and zoning decisions by non-federal units of government" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was inhibiting the deployment of wireless communications services. H.R. Rep. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. The TCA was designed to remedy that situation by facilitating deployment of new wireless telecommunications technology and encouraging the entry of new market participants, thereby facilitating the provision of

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(1999), that "[i]t would be [a] gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity.")

better services, more choices, and lower prices for consumers. 110 Stat. at 56. Indeed, the House Conference Report on the Act indicates that the prohibition of service section was intended to preempt local regulations "that may prohibit or have the effect of prohibiting *any entity* from providing interstate or intrastate telecommunications services." H.R. Conf. Rep. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 4, 138 (emphasis added). That report also indicates that the prohibition of service section was intended "to remove *all barriers to entry* in the provision of telecommunications services." *Id.* (emphasis added). Similarly, the House Committee Report states that "State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements *which will inhibit the deployment of Personal Communications Services (PCS)*[.]" *Id.* (emphasis added). That Report further indicates that the Act "must ensure (1) State and local regulation [of wireless facilities] . . . does not have the effect of precluding *any commercial mobile service*." House Rep. No. 104-204, *reprinted in* 1996 U.S.C.C.A.N. 4, 61 (emphasis added).

In addition, the administrative history against which the TCA was enacted shows that Congress could not have intended the "one provider" rule. As early as 1981, the FCC rejected the notion that one wireless services provider could adequately serve a given geographical area. *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8845 ¶ 3 (1995) ("[I]n 1981, to ensure competition in the cellular business, the Commission decided to license two competing cellular systems in every area."). When the FCC revisited the issue, it decided to allocate enough of the radio spectrum to PCS to "ensure at least three, and possibly as many as six, new competitors to the cellular carriers in each market." *Id.* ¶ 4. The FCC's goal was to "inject major new competition into the mobile telecommunications services market by

creating at least three new major competitors to cellular and other current [mobile communications] providers in each area." *Id.* at 8859 ¶ 45. The TCA adopts the FCC's commitment to major new competition and states, explicitly, that it is designed to "promote competition and reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56. Thus, although the TCA intended to preserve local authority, it specifically aimed to prohibit local decisions that would prevent robust competition between numerous providers.

The "one provider" rule runs flatly against that intention and should therefore be rejected. As the First Circuit explained, "[i]t is highly unlikely that Congress intended the many qualitatively different and complex problems to be lumped together and solved by a rule for all seasons that any coverage in a gap area automatically defeats an effective prohibition claim." *Second Generation Properties*, 313 F.3d at 633. The TCA must not be read as leading to the "untenable result that once personal wireless services are available somewhere within the jurisdiction of a state or local government, whether by virtue of a facility located outside or inside its borders, the state or local government could deny any further applications with impunity." *Willoth*, 176 F.3d at 641. Yet under the "one provider" rule, the TCA is so read, and ensures the paradoxical result that it "will have the effect of eliminating competition." *Independent Wireless One Corp.*, 242 F. Supp. 2d at 420.

The Third Circuit further erred in concluding that the TCA's "unreasonable discrimination" presents an alternative claim that corrects the anti-competitive damage created by the "one provider" rule. As shown above, the non-discrimination provision allows state and local governments to draw innumerable distinctions that have the effect of prohibiting provision of wireless service. *Second Generation Properties*, 313 F.3d at 634-35. In fact, courts have denied

discrimination claims even when the applicant planned to co-locate the wireless facility on a structure that already hosted similar wireless facilities. *See, e.g., Nextel Communications. v. City of Cambridge*, 246 F. Supp. 2d 118, 125 (D. Mass. 2003) (denying unreasonable discrimination claim when antennae on hotel would be mounted differently than antennae of other providers on same hotel); *Airtouch Cellular*, 83 F. Supp. 2d at 1165-66 (denying unreasonable discrimination claim with respect to application filed roughly one year after an approved application because the zoning board believed that the neighborhood had become more sensitive to aesthetics since the facility on the same water tower had been approved); *see also* Mitchell A. Carrell & Robert B. Foster, *Railroad Tracks by Walden Pond: The Ongoing Struggle Between Towns and Providers Under the Telecommunications Act of 1996*, 33 Urb. Law. 781, 784 (2001) (calling *Airtouch* "[o]ne of the most striking examples of a court's disinclination to find unreasonable discrimination" and recounting the trend, from 1998 to 2000, of courts defining "'discrimination' narrowly" and declining to find TCA violations).

Perhaps more importantly, the "unreasonable discrimination" provision does not apply in a large number of cases in which the "one provider" rule effectively prohibits the provision of wireless services. Here, for example, the Third Circuit found no unreasonable discrimination because the Zoning Board had allowed a wireless facility to be constructed in Easttown Township's faraway business district. (App, *infra*, at 12a-13a). It was undisputed, however, that Omnipoint could not fill the gap in service via a wireless facility located in the business district. (*Id.* at 7a n.8, 57a). Omnipoint therefore proposed to construct a wireless facility that was the "least intrusive" option. Omnipoint further presented evidence establishing its inability to construct a tower elsewhere or provide service in an alternative manner. Nonetheless, under the "one provider" rule adopted by the Third Circuit, the Zoning Board could,

and did, deny Omnipoint's application. The TCA's "unreasonable discrimination" provision could not, and did not "temper" the impacts of the "one provider" rule as the Third Circuit anticipated. *Penn Township*, 196 F.3d at 398. Omnipoint is left without the means to remedy the gap in service its customers face. Thus, the TCA's unreasonable discrimination provision cannot take the place of the TCA's prohibition of land use decisions that have the effect of prohibiting the provision of personal wireless services.

## CONCLUSION

This Court should grant Omnipoint's petition for Writ of Certiorari.

Respectfully submitted,

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OCTOBER 2003.

**Appendix A**

United States Court of Appeals,
Third Circuit.

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Appellant
v.
ZONING HEARING BOARD OF EASTTOWN
TOWNSHIP.

No. 02-2194.

Argued Dec. 19, 2002.
Sur Panel Rehearing Submitted May 13, 2003.
June 4, 2003.

Paul J. Lawrence (Argued), Jay Carlson, Preston, Gates & Ellis, Seattle, James C. Dalton, Christopher H. Schubert, Riley, Riper, Hollin & Colagreco, Paoli, for Appellant.

Andrew D.H. Rau (Argued), Unruh, Turner, Burke & Frees, West Chester, John S. Halsted, Gawthrop, Greenwood & Halsted, West Chester, Paola Tripodi Kaczynski, Holsten & Associates, Media, for Appellee.

Before SLOVITER, MCKEE, and ROSENN, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

This matter is before us on a Petition for Rehearing filed by the Easttown Township Zoning Board ("Zoning Board") from the decision of this panel filed February 12, 2003. In that opinion, originally reported at 319 F.3d 627 (3d Cir.2003), we considered the appeal of Omnipoint Communications Enterprises, L.P. from the decision of the Magistrate Judge who upheld the Zoning Board's rejection of Omnipoint's application for a variance to locate its telecommunications tower in a residential district. In our original decision authored by Judge Rosenn we affirmed in part, but vacated in part and remanded to the Magistrate Judge with directions to recalculate the call failure rate in the area at issue to determine whether there is a significant gap in telecommunications service in Easttown Township.

The Zoning Board filed a Petition for Rehearing arguing that the panel decision was contrary to the decision of this court in *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir.1999), where we held that a provider whose application has been denied must show both that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network and that the manner in which it proposes to fill that gap is the least intrusive on the values that the denial sought to serve. The Petition for Rehearing argued that the panel decision erred in its conclusion regarding the manner in which the relevant gap should be determined. We directed Omnipoint to file an Answer to the Petition for Rehearing, and after reconsideration the panel majority has vacated the original opinion and agreed with the position of the Zoning Board for the reasons set forth hereafter. Judge Rosenn continues to adhere to the position in his original opinion. Because the panel majority disagrees only with parts II and VII of the original opinion,

we reproduce the introduction (excising only the last sentence thereof), Parts I, III, IV, V and VI of Judge Rosenn's original opinion which we incorporate herewith, inserting asterisks to reflect omissions:

This case raises several important questions concerning the burgeoning wireless telecommunications industry and the interpretation and application of the Telecommunications Act, 47 U.S.C. § 151 et seq. (TCA). Omnipoint is a wireless telecommunications provider that claims that there is a gap in the wireless telecommunications services available to remote users in Easttown Township, Pennsylvania. Omnipoint sued the Zoning Hearing Board (ZHB or Zoning Board) in the United States District Court for the Eastern District of Pennsylvania, claiming that the ZHB violated the prohibition and anti- discrimination provisions of the TCA by denying Omnipoint's request for a variance to locate a telecommunications tower in a residential district. *See* 47 U.S.C. § 332(c)(7)(B)(i). Furthermore, Omnipoint alleges that the ordinance under which its variance application was denied violates Pennsylvania law because it is either de jure or de facto exclusionary and fails to provide a "fair share" of Township land for telecommunications uses.

The District Court initially issued a writ of mandamus ordering the ZHB to grant a variance because the Court held that the ZHB decision relied exclusively on aesthetic concerns in its denial and not on substantial evidence supporting rejection. 72 F.Supp.2d 512 (E.D.Pa.1999). We vacated this writ and remanded the case to the District Court for reconsideration in light of *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir.1999). *See Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Township*, 248 F.3d 101 (3d Cir.2001) (*Omnipoint I*). On remand, Magistrate Judge Hart (MJ) denied Omnipoint's claims because he concluded that Omnipoint had failed to establish a "significant gap" or unreasonable

discrimination under the TCA, or unconstitutional exclusion under Pennsylvania law.

I.

Omnipoint is a licensed provider of wireless digital telephone communications services. As such, it uses a low power radio signal that is transmitted between a portable telephone and an Omnipoint antenna. The antenna then feeds the radio signal to an electronic device that is located nearby. In turn, that device connects the signal to an ordinary telephone line and routes it anywhere in the world. The combination of antenna and equipment is known as a cell site. Because of the low radio signal used by Omnipoint, the range of the cell site is quite small. For example, in Easttown Township, the maximum coverage of a cell site is two miles. When a wireless communication facility (WCF) is not available to cover a specific geographic area, customers who live in or travel through that area will experience unreliable service, dropped calls, or an inability to connect to the Personal Communication Service (PCS) network.[1]

Omnipoint sought to place a PCS tower in Easttown Township because of the gap in its wireless service. Omnipoint hoped to construct a 110-foot stealth flagpole designed PCS tower, 24 inches in diameter at the base and tapering to 16 inches at the top.[2] The fiberglass flagpole structure is

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[1] PCS differs from "cellular" technology in that it allows for the digital, wireless transmission of video, text, and messaging information in addition to the transmission of voices.

[2] WCFs must be mounted at a minimum height, which varies depending on the topography and vegetation of the region, the amount of service area to be covered, and other factors. The proposed tower would be located within a thirty-feet by thirty-feet enclosure, surrounded by an eight-foot high chain-link fence topped with barbed wire. *See ZHB Decision*, A 668.

designed to incorporate the telecommunications antennae which would be invisible from the outside. For this flagpole, Omnipoint leased space on land owned by the *Or Shalom Synagogue*, located in an area zoned as residential. Under Easttown's zoning ordinance, a communications tower is not a permissible use in residential districts and no residential structure may be higher than thirty- five feet.[3]

Omnipoint applied to Easttown Township's Zoning Hearing Board for use and height variances. It also challenged the validity of the zoning ordinance under Pennsylvania law and the TCA. Omnipoint alleged that the extant ordinance prohibited or effectively prohibited wireless service in violation of the TCA. ZHB held three public hearings on the applications at which a number of local citizens complained that the stealth tower would be an eye-sore. ZHB issued a detailed written decision denying Omnipoint's application and stating that the ordinance was valid under both Pennsylvania and federal law.

The District Court granted Omnipoint's motion for summary judgment in part and ordered ZHB to grant Omnipoint's application. 72 F.Supp.2d 512 (E.D.Pa.1999).[4] We vacated that decision. On remand, the parties consented to

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[3] At the time of Omnipoint's zoning application, the ordinance did not explicitly provide for communications towers. Easttown has since amended its ordinance to allow cellular communications facilities as a conditional use in business and multi-family conditional use districts. *See* 72 F.Supp.2d at 514 n. 2.

[4] The District Court did not rule on Omnipoint's state law claims or its claim that the ZHB's decision violated 47 U.S.C. § 332(c)(7)(B)(i)(II) by prohibiting wireless service. Omnipoint's federal suit also included a civil rights claim under 42 U.S.C. § 1983 which Judge Katz denied because he ruled that the TCA's remedial scheme was sufficiently comprehensive to infer Congress' intent to foreclose § 1983 remedies. *See* 72 F.Supp.2d at 517. Judge Katz also found that Omnipoint had not shown a substantive due process violation. *Id.*

have the case proceed in a bench trial before the U.S.M.J. *See* 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.[5] The parties supplemented the record with expert reports and testimony regarding telecommunications services in Easttown. Omnipoint's principal witness, radio frequency engineer Paul Dugan, supervised drive tests in which approximately six hundred forty actual calls were made using eight cell phones of various providers. Dugan asserted that a signal strength of "negative 85 dbm" was necessary for reliable service.[6] On April 1, 2002, the MJ entered judgment in favor of ZHB. *See* 189 F.Supp.2d 258 (E.D.Pa.2002). The MJ found that Omnipoint had failed to establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network. The MJ placed significant weight on his finding that mobile phones other than Omnipoint's experienced problems only 1.96% of the time in Easttown. *See* 189 F.Supp.2d at 265. He also concluded that the ordinance was not exclusionary. Omnipoint timely appealed.[7]

III.

The Magistrate Judge found as a fact that Omnipoint's stealth flagpole was the least intrusive of the possible alternatives. *See* 189 F.Supp.2d at 262. We do not disturb this

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[5] This case involves a mixture of federal and state claims. The federal claims arise under the TCA. The Magistrate Judge had jurisdiction over these claims pursuant to 28 U.S.C. § 1331. The Magistrate Judge also had jurisdiction to resolve Omnipoint's state statutory and constitutional challenges to the ordinance pursuant to 28 U.S.C. § 1367(a). *See Omnipoint I*, 248 F.3d at 108 n. 5.

[6] Omnipoint has not cited any Federal Communication Commission standard for call completion rates. *See* 189 F.Supp.2d at 264.

[7] The MJ's April 1, 2002 decision was a final order for the purposes of 28 U.S.C. § 1291.

finding because it is not "clearly erroneous." *See Warner-Lambert Co.*, 204 F.3d at 89 n. 1. The Township cites the ZHB's original findings that Omnipoint considered few other sites and approached a horse farmer but did not follow up. ZHB's brief also criticizes Omnipoint for not engaging in studies to assess the visual and auditory impact of the flagpoles on the neighboring properties.

Magistrate Judge Hart found that the horse farmer was not interested in leasing the property and that Omnipoint considered other sites but did not choose them because Omnipoint was involved in unrelated litigation with the owners. *See* 189 F.Supp.2d at 262-63.[8] Thus, the MJ's finding that the stealth flagpole was the least restrictive alternative is not clearly erroneous.

## IV.

In Pennsylvania, a land use restriction is a valid exercise of a municipality's police power when it promotes public health, safety, and welfare and is substantially related to the purpose it purports to serve. *See Kirk v. Zoning Hearing Bd. of Honey Brook*, 713 A.2d 1226, 1229 (Pa.Commw.1998). A zoning ordinance is presumed valid and a party challenging it has a heavy burden of proving its invalidity. *See Penn Township*, 196 F.3d at 475. This presumption can be overcome by proof that the ordinance totally excludes an otherwise legitimate use. *See Farrell v. Worcester Township Bd. of Supervisors*, 85 Pa.Cmwlth. 163, 481 A.2d 986, 989

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[8] Moreover, the MJ could reasonably have concluded that a tower in the business district would not have remedied Omnipoint's gap because Omnipoint explained that the maximum coverage of its technology's cell sites in the Township is two miles.

(1984).[9] Exclusionary ordinances take two forms: de jure and de facto. De jure exclusion exists where "the ordinance, on its face, totally bans a legitimate use." *Id.* De facto exclusion exists "where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality." *Id.*[10] The MJ held that Easttown Township Ordinance 160-80 was neither de jure nor de facto exclusionary. We agree.

The ordinance is not facially exclusionary. As interpreted, it does not totally ban a legitimate use. Although the ordinance did not explicitly provide for telecommunications towers, the ZHB twice granted variances for telecommunications towers in the business district under a catch-all provision. 189 F.Supp.2d at 266. Omnipoint argues that a tele-

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[9] A party seeking a use variance must show that the zoning restriction "inflicts unnecessary hardship on the applicant," and: (1) that there are unique physical circumstances or conditions peculiar to the property that create the hardship; (2) that because of these circumstances or conditions, there is no possibility that the property can be developed in conformity with the zoning ordinance; (3) that the applicant did not create the unnecessary hardship; (4) that the variance, if granted, would not alter the essential character of the area; and (5) that the variance, if granted, would represent the least modification possible to the regulation at issue. 53 P.S. § 10910.2 (2002).

[10] Exclusionary impact can invalidate an ordinance without evidence of exclusionary intent. *Overstreet v. Zoning Hearing Bd. of Schuylkill Township*, 152 Pa.Cmwlth. 90, 618 A.2d 1108, 1113 (1992). If a party rebuts the presumption of constitutionality by presenting sufficient evidence that an ordinance is exclusionary, the burden then shifts to the state to demonstrate that the zoning ordinance bears a substantial relationship to public health, safety and welfare. *Id.*; *see also Exton Quarries, Inc. v. Zoning Bd. of Adjustment of W. Whiteland Township*, 425 Pa. 43, 228 A.2d 169, 179 (1967) ("[A] zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.").

communications tower does not fall within the catch-all provision because it is not of the same "general character" as any of the enumerated uses. However, the ZHB's interpretation of a municipality's zoning ordinance is entitled to weight because it reflects the construction of a statute by an entity charged with its execution and application. *See Sprint Spectrum v. Zoning Hearing Bd. of Mahoning Township*, 46 Pa. D. & C.4th 187, 192 (Carbon County CCP 2000). Furthermore, simply because an ordinance does not expressly permit a use does not necessarily mean that it negates that use. *Cf. APT Pittsburgh Ltd. P'ship v. Lower Yoder Township*, 111 F.Supp.2d 664, 670 (W.D.Pa.2000). Otherwise, the TCA would force localities to enshrine every change in the telecommunications industry into local ordinances at an unrealistically rapid rate. *See id.*

The ordinance was not de facto exclusionary either. Omnipoint argues that the height restrictions contained in the zoning ordinance effectively prohibit the establishment of functional telecommunication facilities in Easttown Township. The ordinance contained a thirty-five foot height restriction in residential areas and a fifty-foot height restriction in business districts. *See* 189 F.Supp.2d at 267. The Magistrate Judge rejected this argument because the ZHB had previously granted height variances for communications facilities. *Id.* at 268; *see also Penn Township*, 196 F.3d at 476 (explaining that "to succeed in its exclusionary zoning claim ... [the Plaintiff] had to prove that no other telecommunications provider, including itself, could build a functional tower ...").[11]

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[11] Omnipoint argues that Easttown Township cannot circumvent an otherwise exclusionary zoning ordinance by relying on the availability of a variance because of the high hurdles applicants must normally face to obtain a variance. *Cf. Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). This argument has greater force when plaintiffs seek a use variance, as in *Girsh Appeal*, rather than a height variance. *See* 189 F.Supp.2d at 268. A use variance is more burdensome to obtain than a height variance.

Omnipoint's alternative argument under the "fair share" principle also fails. The "fair share" principle applies when an ordinance only partially excludes a land use. An ordinance is exclusionary when a municipality fails to provide for its "fair share" of a legitimate land use such as multi-family dwellings. *See Surrick v. Zoning Hearing Bd. of the Township of Upper Providence*, 476 Pa. 182, 382 A.2d 105 (1977). Local political units must plan for and provide land-use regulations that meet the legitimate needs of all categories of people who may desire to live within its boundaries. *See id.* at 108.[12]

Omnipoint contends that Easttown Township fails to provide a "fair share" allowance for telecommunications uses. The B-Business District comprises only 1.1% of the total area of Easttown Township.[13] The relevant inquiry is whether Omnipoint has carried its "heavy burden" of showing that the needs of the community's residents are not being adequately served. *See Montgomery Crossing Assoc. v.*

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*Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43, 47 (1998). Although Omnipoint sought both a use and a height variance, its argument that the ordinance is de facto exclusionary necessarily focuses on the ordinance's height restrictions. Thus, the MJ properly rejected this argument.

[12] In *Surrick*, the Pennsylvania Supreme Court articulated several factors to be considered in applying the "fair share" principle in the housing context: (1) whether the area is a logical area for development and population growth; (2) the present level of development; (3) population density data; (4) the percentage of total undeveloped land; and (5) the percentage of undeveloped land available for development. *See Surrick*, 382 A.2d at 110.

[13] The Township contests this finding and argues that the business district is larger than Omnipoint asserted it was at trial. However, the MJ adopted the 1.1% figure as a fact, *see* 189 F.Supp.2d at 269, and this finding is not clearly erroneous.

*Township of Lower Gwynedd*, 758 A.2d 285, 289 (2000); *Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 335 (1975). Other telecommunications providers have been able to serve the needs of their customers by placing towers within the business district. To overcome the presumption that the ordinance is constitutional, Omnipoint would have had to show a causal link between the small area of land zoned for business use and the community residents' inability to meet their needs. This, it failed to do.

V.

In its original complaint, Omnipoint alleged that ZHB's denial of Omnipoint's application constituted a violation of 47 U.S.C. § 332(c)(7)(B)(i)(I) because ZHB unreasonably discriminated against "providers of functionally equivalent services." Judge Katz denied this claim on the ground that Omnipoint had not shown discrimination, reasonable or otherwise. *See* 72 F.Supp.2d at 515 n. 3. In its cross-appeal of Judge Katz's decision, Omnipoint did not include the court's finding on the discrimination issue. *Omnipoint I*, 248 F.3d at 103. The MJ ruled that this discrimination issue was not properly before him because it had not been presented to the panel on the first appeal. *See* 189 F. Supp.2d at 270.

Omnipoint argues that a cross-appeal is only required when the appellee advances an issue on appeal that aspires to alter the trial court's decision. *Cf. New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1205 (3d Cir.1991). Appellee is free to assert any alternative theory in support of the District Court's decision, even without a formal cross-appeal. *See id.*; *see also Scott v. Univ. of Delaware*, 601 F.2d 76, 91-92 (3d Cir.1979) (Adams, J., concurring).

The discrimination issue is properly before us and we now reject Omnipoint's argument on the merits. The TCA prohibits unreasonable discrimination against "providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). The TCA does not prohibit all discrimination against providers, only unreasonable discrimination. *See AT&T Wireless PCS v. Virginia Beach*, 155 F.3d 423, 427 (4th Cir.1998).

In *Nextel*, we explained that the purpose of the "unreasonable discrimination" language of § 332(7)(B)(i)(I) is to ensure that once the municipality allows the first wireless provider to enter, the municipality may not unreasonably exclude subsequent providers who similarly wish to enter and create a competitive market in telecommunications services. *See Nextel*, 282 F.3d at 264 n. 6. Nextel creates a two-part test for determining if a zoning board has unreasonably discriminated. First, the plaintiff must show that the relevant providers are functionally equivalent. Second, the plaintiff must show that the government body unreasonably discriminated. *Id.* at 266.

The equivalency of function relates to the telecommunications services the entity provides rather than to the technical particularities of its operations. *See id.* at 266 n. 13. We hold that Omnipoint is functionally equivalent to the other telecommunications providers that were granted variances in Easttown Township.

Omnipoint's discrimination claim fails under the second part of the test. Permitting the erection of a communications tower in a business district does not compel the ZHB to permit a similar tower at a later date in a residential district. *See Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir.1999); *see also* H.R. Conf. Rep. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222 ("the conferees do not intend that if a State or local government grants a permit in a

commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district"). The two communications towers that existed in Easttown at the time of Omnipoint's application were both located in areas zoned for business rather than residential use. *See* 72 F.Supp.2d at 515 n. 3. Thus, the ZHB's denial was not unreasonable and Omnipoint's § 332(c)(7)(B)(i)(I) challenge fails.[14]

VI.

Omnipoint dedicates a significant portion of its brief to a direct attack on *Penn Township*. It points to the TCA, which seeks to create a "pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124; *see also Nextel*, 282 F.3d at 264 n.

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[14] Omnipoint's argument to the contrary focuses on the ugliness of the monopole previously approved by the ZHB for placement at the Berwyn Fire Company and the relative ease with which a variance was granted in that case. Even if the Berwyn Fire Company monopole is uglier than the proposed Omnipoint structure, that does not alter Omnipoint's intention to place its PCS tower in an area zoned for residential use. Furthermore, Omnipoint contests the ZHB's finding that the proposed flagpole would be a "blight" that would "loom over residential communities." Our role "is not to weigh the evidence contained in the record or substitute [our] own conclusions for those of the fact finder," but rather "to determine whether there is substantial evidence in the record as a whole to support the challenged decision." *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d Cir.1999); *Omnipoint I*, 248 F.3d at 106. Many community residents objected after seeing the plans and Omnipoint's land planning expert conceded that the tower would be "taller than most I have seen" in a residential area. *ZHB Decision*, A 670. The ZHB and the MJ both found that the 110-foot flagpole would be a blight that would loom over the residential community. This finding was supported by substantial evidence.

6. Omnipoint argues that *Penn Township* undermines Congress' purpose of creating a competitive market for telecommunications services and has the effect of privileging first entrants with antiquated technology over subsequent entrants who could promote consumer welfare by creating competition and offering superior services. We decline to address this question because a panel cannot overrule existing Third Circuit precedent. *See* 3d Cir. Internal Operating Proc. 9.1.

Sur Rehearing

In Part II of the original opinion, we addressed Omnipoint's argument that the Township zoning ordinance has "the effect of prohibiting the provision of personal wireless services" in violation of the TCA. The issue before us on rehearing is the manner in which to determine the existence of a "significant gap." That is the portion of the original opinion that we have withdrawn and the issue we now consider.

Congress enacted the TCA to provide "'a pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'" *Penn Township*, 196 F.3d at 473 (citation omitted). The TCA preserves the authority of state and local government to regulate land use, but limits that authority with respect to personal wireless service facilities. *Id.* The TCA provides:

> Preservation of local zoning authority
> (A) General authority
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government ... over deci-

> sions regarding the placement, construction, and modification of personal wireless service facilities.
> (B) Limitations
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7) (emphasis added).

In *Penn Township*, 196 F.3d 469, we considered the claims of APT, a wireless communications provider, which had been denied a zoning variance that it sought so that it could erect a communications tower and remedy a gap in coverage in its wireless service. APT claimed, inter alia, that the zoning ordinance was unconstitutional under Pennsylvania law and violated the TCA because it had the "effect of prohibiting the provision of personal wireless services" in the township. The township's ordinance did provide for communications towers in the township's light industrial districts but APT concluded that land in those districts was either not technologically feasible for it or unavailable. APT then argued that the ordinance was unconstitutionally exclusionary, an argument we rejected:

> The fact that the design APT has chosen for its system enables it to erect the tower that it wishes to build only on a relatively small portion of the land in the M Districts does not make Ordinance 109 exclusionary.

> Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township. To be exclusionary, the ordinance must effectively foreclose not only APT's use, but all use.

*Id.* at 477.

We also rejected APT's claim that the zoning ordinance had "the effect of prohibiting the provision of personal wireless services" in violation of the TCA. We explained that "[i]nterpreting the TCA's 'effect of prohibiting' clause to encompass every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services ... would give the TCA preemptive effect well beyond what Congress intended." *Id.* at 478.

We recognized that there can be circumstances in which a provider would be able to "establish that an individual adverse zoning decision has the 'effect' of violating [the TCA]." *Id.* at 479. In that connection, we approvingly quoted the decision in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir.1999), where that court concluded that the most compelling reading of the "effect of prohibiting" provision is that " 'local governments may not regulate personal wireless service facilities in such a way as to prohibit remote users from reaching such facilities. In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines.'" *Penn Township*, 196 F.3d at 479 (quoting *Willoth*, 176 F.3d at 642-43).

We agreed with the *Willoth* court's recognition that the TCA preserved the regulatory authority of local zoning

boards who may insist that service gaps be closed by the least intrusive means. *Id.* Furthermore, because "the focus is on the remote users' access to the national telephone network, the authority of the local board to deny applications is greater where the area which the provider applicant seeks to serve is already served by another provider." *Id.* at 479-80. Nonetheless, the Board's denial of an application is subject to the TCA provision prohibiting unreasonable discrimination among providers. *Id.*

In *Penn Township* we set forth what a provider must produce to show a violation of the TCA:

> [I]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system. In order to show a violation of subsection 332(c)(7)(B)(i)(II) under *Willoth*, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.
>
> Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate

> less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

*Id.* at 480 (emphasis added) (footnote omitted). We agreed with the *Willoth* court that the denial of a variance "will still be tempered" by subsection B(i)(I) of the TCA which prohibits unreasonable discrimination. *Id.* at 480 (quoting *Willoth*, 176 F.3d at 643).

Omnipoint has not shown that the Zoning Board's denial of a variance is the result of any unreasonable discrimination. Instead, it focuses most of its fire on the issue whether it showed a "significant gap" in service, a finding required by *Penn Township* before a disappointed applicant can successfully claim that the denial of the application has the effect of prohibiting the provision of personal wireless services. Omnipoint points to the testimony of its expert before the Zoning Board, Edmond Vea, that Omnipoint's wireless signal strength, as well as that of other wireless carriers, drops below negative 85 dBm in the area at issue and that when the signal is this low, wireless service drops below acceptable criteria and there is a probability that callers will lose their calls or will not be able to make a call. It also points to the testimony of another of its experts, Paul Dugan, who testified before the Magistrate Judge that a signal above negative 85 dBm is required to provide reliable service.

Dugan testified that, in conducting the tests on which Omnipoint relied, he linked eight cellular phones to a laptop computer and measured the signal strength and performance of the eight cellular services in Easttown Township. A car was driven through the Township, the computer initiated calls and Dugan collected the data. Dugan concluded that a

coverage hole exists for all licensees near Omnipoint's proposed communication facility because the carriers do not have sufficient signal strength or negative 85 dBm.

The Magistrate Judge found several flaws in Dugan's assessment. He explained that Dugan did not identify any regulatory standard requiring negative 85 dBm as the minimum signal strength, and that he did not establish a correlation between the negative 85 dBm standard and the actual ability of users to access the national telephone network. Rather, Dugan's own charts reflected that most of the calls were initiated successfully even when the signal strength was below negative 85 dBm. Although Dugan explained that he would expect to lose calls if he drove for an extended period of time, the Magistrate Judge noted that the burden is on Omnipoint to establish a significant gap.

The Magistrate Judge further found that Dugan's test results establish that there is reliable cellular service. Dugan testified that each of the eight phones made about 80 calls for a total of 640 calls. The seven service providers other than Omnipoint had 10 dropped calls and only one instance of no service. The Magistrate Judge calculated that of the 560 calls made using the other providers' services, only 11 or 1.96% experienced service problems. Omnipoint had 11 dropped calls and 13 instances of no service, or service problems 30% of the time. The Magistrate Judge concluded that only Omnipoint was incapable of providing reliable service to its customers and that the *Penn Township* test is not satisfied because "'[i]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system.'" *Omnipoint Comm. Enter. v. Zoning Hearing Bd.*, 189 F.Supp.2d 258, 265 (E.D.Pa.2002) (quoting *Penn Township*, 196 F.3d at 480). The Magistrate Judge therefore concluded that where the drive test data does not support the expert opinion that weak signal strength results in unreliable

wireless service, Omnipoint has not met its burden of establishing a significant gap in coverage.

Omnipoint argues in its reply brief that the Magistrate Judge erred in measuring the gap in service by evaluating the coverage of the seven other providers without including Omnipoint in its calculation. Omnipoint contends that under Penn Township, the Magistrate Judge should have looked at all of the providers in the aggregate, and if he had he would have determined that the call failure rate is approximately 5.4% instead of 1.96%, which is sufficient to establish a significant gap.[15] This is the principal point of difference between the majority and Judge Rosenn.

*Penn Township* requires a provider to show that "the area the new facility will serve is not already served by another provider." 196 F.3d at 480. Here, there are seven other cellular services provided in the area at issue. If we were to accept Omnipoint's argument, we would make *Penn Township*'s requirement meaningless.

This conclusion is consistent with our earlier opinion in *Nextel West Corp. v. Unity Township*, 282 F.3d 257 (3d Cir.2002), where Nextel claimed that the zoning ordinance of the defendant township had the effect of prohibiting communications towers in violation of the TCA.[16] We reaffirmed the *Penn Township* test and explained that the first prong (that the provider must show that its facility will fill an existing significant gap in the service available to remote

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[15] As a general matter, courts of appeals will not consider arguments raised on appeal for the first time in a reply brief. *United States v. Boggi*, 74 F.3d 470, 478 (3d Cir.1996). Even if this argument were properly before us, it is not persuasive for the reasons set forth in the text.

[16] The district court held that the case was moot but we reversed and remanded for an adjudication on the merits. *Id.* at 259.

users) requires "a gap from a user's perspective, rather than a *particular provider's* perspective." *Nextel West*, 282 F.3d at 265. We explained: "[t]hus, this prong focuses on whether any provider is covering the gap, instead of whether the gap exists only in, for example, Nextel's service. A provider must 'include evidence that the area the new facility will serve is not already served by another provider.'" *Id.* (quoting *Penn Township*, 196 F.3d at 480). We remanded so that the district court could determine whether a gap "existed for all or for Nextel alone." *Id.* at 266.

It is therefore clear that not only our opinion in *Penn Township* but also our opinion in *Nextel West* reject Omnipoint's argument that the existence of a significant gap must include the data from the applicant provider.

Omnipoint argues that our holding will promote monopolization and conflict with the pro-competitive objectives of the TCA (adopting Judge Rosenn's view expressed in the original panel opinion). But nothing we say here suggests that the Zoning Board can deny all applications after the first. The issue was considered in *Nextel West* where we explained that the "effectively prohibit" and "unreasonably discriminate" provisions of the TCA work together to promote the expansion of wireless telecommunications networks. *Id.* at 264 n. 6. We stated,

> The first provision (forbidding ordinances which effectively prohibit wireless facilities) aims to open up municipalities to wireless providers generally. The second provision (against unreasonable discrimination) seeks to ensure that, once the municipality allows the first wireless provider to enter, the municipality will not unreasonably exclude subsequent providers who similarly wish to enter

> and create a competitive market in telecommunications services.

*Id.* The area at issue in this case is already served by seven other providers so there is no basis for concern about monopolization.

Finally, in its Answer to the Petition for Rehearing, Omnipoint suggests that if we find that our decision in *Penn Township* would direct a decision contrary to that which it seeks, we should seek en banc review and explicitly overrule our *Penn Township* decision. Judge Rosenn has already explained that we are bound by our earlier opinions. Moreover, as we have just noted, it is not only *Penn Township*, but also *Nextel West* that informs our decision. Even if we were free to reconsider our earlier decisions, we would not change them.[17] We do not read those decisions to authorize the township zoning boards to deny any application once the area is already served by another provider, which is Omnipoint's restatement of the holding. Instead, we merely hold that a fact-finder determining the existence of a significant gap should examine whether other providers already serve the area. The fact that one applicant may have coverage problems is not determinative of whether there is a significant gap.

We conclude that the Magistrate Judge properly applied *Penn Township* and did not err in rejecting Omnipoint's argument that the Township zoning ordinance has "the

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[17] It is of some interest that the decision in *Second Generation Props. v. Town of Pelham*, 313 F.3d 620 (1st Cir.2002), on which the dissent relies, expressed its disagreement with the decision in *Penn Township* and, as does the dissent, looked to qualitative aspects of competitive service to show a significant gap. However, Omnipoint did not produce evidence of qualitative shortcomings, if any, in the competitive service, and limited itself to evidence as to the quantity of calls.

effect of prohibiting the provision of personal wireless services" in violation of the TCA.

VII.

Accordingly, we will affirm the order of the Magistrate Judge.

ROSENN, Circuit Judge, dissenting.

I believe that the majority decision in this case thwarts the policies and purposes of the Federal Telecommunications Act of 1996 (TCA). I fear that it will impede the inevitable progress of personal wireless services. I am, therefore, constrained to dissent.

As the majority points out, Congress had two sets of priorities in enacting the amended Telecommunications Act in 1996.[1] Congress sought to create a "pro-competitive, deregulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124. At the same time, Congress attempted to balance this goal against the legitimate concerns of state and local governments in regulating the siting of wireless facilities. H.R. Conf. Rep. No. 104-204, at 94-95 (1995), reprinted in 1996 U.S.C.C.A.N. 61.

With respect to personal wireless service facilities, Congress limited state and local zoning authority to some degree. When regulating the placement, construction, and modification of personal wireless service facilities, state and local governments: (I) shall not unreasonably discriminate

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[1] Our disagreement today is precipitated in part by the notoriously opaque wording of the TCA. *See AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 397, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."). In light of this ambiguity, we look to congressional history and subsequent caselaw to guide us.

among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i). The scope of the latter limitation, known as the "prohibition of service" clause, is the genesis of the difference of opinion here.

We have previously considered the scope of the prohibition of service clause. *APT Pittsburgh Ltd. P'ship v. Penn Township, Butler County*, 196 F.3d 469 (3d Cir.1999), established a test to determine if the decision of a local zoning authority has "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). A service provider must first "show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480.[2] The question is what services are available to the remote users of all service providers in the specific area where the challenging provider asserts that there is a significant gap. A gap is a gap in the service offered to remote wireless users by the existing providers.

There is no dispute that the gap must be from the users' perspective, rather than from a particular provider's perspective. *See Nextel W. Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir.2002). Omnipoint cannot simply point to the gap in the service it provides to establish a prohibition of service claim under 47 U.S.C. § 332(c)(7)(B)(i)(II). It must show that the telecommunications needs of users in the community as a whole are not being adequately served.

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[2] In the second prong of the prohibition of service test, the provider challenging the zoning decision must also show that its proposal was the least intrusive on the values the denial sought to serve. *See Penn Township*, 196 F.3d at 480.

In my view, the proper test for determining whether there is a significant gap is to look at all wireless telephone users, including the plaintiff's customers. Instead, the Magistrate Judge (MJ) looked only at non-Omnipoint users and found that non-Omnipoint users experienced problems only 1.96% of the time in Easttown Township. *See* 189 F.Supp.2d at 265. Based on this finding, the MJ concluded that Omnipoint had failed to carry its burden of proving a significant gap. I believe that the relevant figure in the Penn Township analysis is the aggregate, including Omnipoint users and including calls outside Easttown Township, but within each provider's Wireless Communication Facility's coverage area. Under this standard, the MJ's 1.96% figure understates the actual call failure rate. Omnipoint places the number at approximately 5.5%. If this figure is correct, Omnipoint may be able to carry its burden of showing a significant gap in service. *Cf. Cellular Tel. Co. v. Zoning Bd. of Adjustment of Harrington Park*, 90 F.Supp.2d 557, 565 (D.N.J.2000) (holding that a call failure rate of five to seven percent is a significant gap).[3]

The difference between the majority and me hinges on what it means to establish a significant gap from the users'

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[3] I agree with the majority that Omnipoint's other evidence to demonstrate a significant gap is not persuasive. Maj. Op. at 16-17. The MJ held that Omnipoint's expert witness Dugan had failed to establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network. Dugan's own tests revealed that cell phone users in the area below negative 85 dBm nevertheless were able to make and receive calls using non-Omnipoint networks. *See* 189 F.Supp.2d at 264. I agree with the MJ's finding that Omnipoint did not carry its burden of showing that a signal strength of less than negative 85 dBm alone proves a significant gap. Dugan argued that the active portion of one of the tests that he conducted understates the problem with the services' reliability in that area. Omnipoint was responsible for correcting this proof problem by more closely replicating actual driving habits and equipment. *See* 189 F.Supp.2d at 264 n. 4.

perspective. In my view, the relevant figure to be analyzed in determining whether there is a significant gap is the aggregate of all the existing remote users. Since Omnipoint users are not newcomers, they deserve consideration.[4] The test I propose is to look at all wireless telephone users, giving existing Omnipoint users no more and no less consideration than the others. The MJ instead looked only at non-Omnipoint users and concluded that Omnipoint had failed to carry its burden of proving a significant gap. In my view, this approach was flawed because it failed to give any consideration whatsoever to existing Omnipoint users.[5] A

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[4] Omnipoint already had an existing license in Easttown Township and an existing facility in the business district. This is not a case where a newcomer seeks to have its potential customers calculated as existing users. On the contrary, Omnipoint is a provider that seeks to expand its service to existing customers by remedying a significant gap in the southern area of Easttown Township.

[5] I would reach this question even though Omnipoint raised this argument for the first time in its Reply Brief. Generally, we do not consider arguments raised for the first time in a Reply Brief, but we do have the discretion to do so in exceptional circumstances. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 204-05 n. 29 (3d. Cir.1990). Here, because I believe the MJ erred in ignoring Omnipoint users in ascertaining whether there was a significant gap in the Township, I would consider Omnipoint's argument to avoid a miscarriage of justice. *Cf. Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1571 (1st Cir.1994) (Courts of Appeals may consider arguments raised for the first time in a Reply Brief if the arguments are "so compelling as virtually to insure the appellant's success" or if the arguments "must be ruled on to avoid a miscarriage of justice"); *see also Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 268 (5th Cir.2000) (Courts of Appeals may review for plain error, where the error is "clear" or "obvious" and affects "substantial rights."); *United States v. Wilson*, 962 F.2d 621, 627 (7th Cir.1992) (Courts of Appeals may consider an argument raised for the first time in a Reply Brief when an issue is serious and was overlooked by all concerned). In this case, the forfeited argument affects the fairness, integrity, and public reputation of the judicial proceedings. *Cf. Dufrene*, 207 F.3d at 268. On remand, I would give Easttown Township adequate

court should look at the record from the perspective of the users, not the providers. A customer who has an existing contract with Omnipoint, who lives in Easttown (or regularly commutes through the township), and who gets reception in 2/3 of Easttown but wants to get reception in the other 1/3 of Easttown logically should be calculated as an existing customer for the purpose of evaluating whether there is a significant gap.

The majority seems to suggest that these users should only be taken into account if there is no service to which they could switch that would give them service in the 1/3 of the township Omnipoint service does not reach. In my opinion, this is an overly restrictive view of existing users, especially because industry practice often requires contracts for service for a certain term, thereby significantly increasing the costs of switching. Additionally, hypothetical Omnipoint users who were not counted in these calculations might be forced by this rule to switch to a provider that did not give them comparable services. By contrast, Omnipoint or another similar digital provider could transmit text, emails, and photographs; a cellular provider can only transmit voice. Thus, denying Omnipoint users consideration in determining whether there is a significant gap is a harsh and regressive result, one that I do not believe Congress envisioned.

As the First Circuit Court of Appeals explained in *Second Generation Props. v. Town of Pelham*, 313 F.3d 620 (1st Cir.2002):

> Such a rule ... does not further the interests of the individual consumer.... [I]t is of little comfort to the customer who uses AT & T

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opportunity to respond to the factual question of whether Omnipoint can show a significant gap under the correct legal standard.

> Wireless ... who cannot get service along the significant geographic gap ... that a Cingular Wireless customer does get some service in that gap. Of course, that AT & T customer could switch to Cingular Wireless. But were the rule adopted, the same customer might well find that she has a significant gap in coverage a few towns over, where AT & T Wireless, her former provider, offers service but Cingular Wireless does not. The result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier. When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result....

*Id.* at 633-34.

I also differ from the majority as to the meaning of a key statement in *Penn Township*, which states that proof of a relevant gap in service requires a provider "to include evidence that the area the new facility will serve is not already served by another provider." *Penn Township*, 196 F.3d at 480. The difficulty is how to interpret this statement in light of the preceding inconsistent statement that "the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Id.* In other words, what happens when one provider already provides a service in part of a township, but many of the township's existing resident users are unable to access the national network in that part of the township? In this case, there is a significant gap in an area of the township when all existing users are taken into account. However, a challenging provider cannot show that "the area the new facility will serve is not already served by

another provider," even though the other provider has inferior functional services.[6]

The majority's interpretation of *Penn Township* is at odds with *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir.1999), a case *Penn Township* referred to as "the most thoughtful discussion" of the prohibition of service clause. *Penn Township*, 196 F.3d at 479. The *Willoth* court described as "untenable" the proposition that "once personal wireless servers are available somewhere within the jurisdiction of a state or local government ... the state or local government could deny any further application with impunity." *Willoth*, 176 F.3d at 641.

There is, therefore, tension within *Penn Township* over what to do with a circumstance in which one user serves part of a township and other existing providers seek to extend their services to that part of the township. On the one hand, *Penn Township* states without qualification that proof of a relevant gap in service requires a provider to include evidence that the area the new facility will serve is not already served by another provider. On the other hand, *Penn Township* refers us to the *Willoth* opinion which states that it is untenable to think that once personal wireless servers are available somewhere within a township, the state or local government could deny any further applications with impunity. The only way to resolve this tension within *Penn Township* that is consistent with congressional intent is to say that the challenger must show that there is a "significant gap" in that part of the township. If there is a significant gap, then

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[6] I am also concerned that today's interpretation of the prohibition of service clause could be applied in other cases in a way that would create a monopoly and hinder Congress' goal of establishing a pro- competitive, de-regulatory national policy framework that opens all telecommunications markets to competition.

the area the new facility will serve is not already adequately served by another provider. *Cf. Willoth*, 176 F.3d at 643 ("... once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader ...") (emphasis added); *Second Generation*, 313 F.3d at 633 n. 13 ("[Willoth' s] stress on adequate coverage should logically mean that the circuit would oppose an 'any coverage equals no gap' rule").

In my view, *Penn Township* did not intend to foreclose proof of a significant gap in service because of the mere presence of one or more telecommunication providers in the jurisdiction.[7] *Penn Township* must be read to mean providers with equal technological services.[8] I believe my approach is also consistent with the approach taken in *Second Generation* by the First Circuit Court of Appeals, the only other circuit to address this question. In a cogently argued opinion, the *Second Generation* court rejected the rule the majority adopts today, *i.e.*, that coverage by any provider precludes all

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[7] It should be noted that the *Penn Township* opinion did not have a developed record that necessitated clarification of these questions of proof.

[8] We have previously addressed the question of functional equivalence in the context of the unreasonable discrimination prong of 47 U.S.C. § 332(c)(7)(B)(i). In *Nextel*, we explained that "[w]e think the equivalency of function relates to the telecommunications services the entity provides, not to the technical particularities (design, technology, or frequency) of its operations. The TCA clearly does not force competing wireless providers to adopt identical technology or design nor does it compel them to fit their networks of antennae into a uniform, rigid honeycomb of interlocking cells. Indeed, the FCC's assignment of a different frequency and signal strength to each licensee renders such uniformity impossible." *Nextel*, 282 F.3d at 266-67 n. 13. Digital phones can transmit voice, email, text, and photographs. Cellular phones can only transmit voice. In my view, this distinction goes beyond "technical particularities." Rather, it is a functional distinction.

statutory prohibition of service claims. *See Second Generation*, 313 F.3d at 632-635. Moreover, *Second Generation* convincingly interprets *Willoth* to reject the majority's rule as well. *See id.* at 632-33 n. 13.

The majority points out that in this case there are seven other cellular providers in Easttown Township. *See* Maj. Op. at 399. However, the number of service providers already in an area is less important in determining whether there is a gap than the percentage of existing users who cannot connect with the national network. The real question is whether there is a gap from the users' perspective because of the providers' limitations of the existing technological facilities. *See Nextel*, 282 F.3d at 265. In this case, it does not matter how many competitors Omnipoint had. What matters is that a significant percentage of all existing users are unable to access the national network because of the shortcomings of the existing providers' facilities.

The majority approach today threatens Congress' goal of promoting the rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans. The existence of older, less functional cellular networks should not be permitted to impede the development of new, digital technologies like PCS and undermine competition in the telecommunications industry. The majority opinion will effectively impede the development of new digital technologies that have a more limited range but superior capabilities.[9]

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[9] Imagine the following hypothetical scenario. In a certain township, there are four providers of wireless service. Each provider has 100 existing users, for a total of 400 users. In the southern part of the township, Providers B, C, and D have adequate cellular service because their towers in the center of the township have broader service areas. Provider A also has a tower in the center of the township, but it is digital, and therefore extends less far but provides more advanced capabilities such as text messaging, digital transmission of photos, and email.

I, therefore, respectfully dissent from the sur rehearing portion of today's opinion.

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Provider A's customers get service in three-quarters of the township (and elsewhere across the country).

The question is whether there is a significant gap in the southern part of the township. Of the 400 existing wireless customers in the township, 100 of them cannot get service and 300 can. Under the majority's approach, the calculation only includes those 300 and there is no significant gap. Also, the majority holds that Provider A and/or its customers could not bring a prohibition of service claim even if there were a significant gap, because Providers B, C, and D already provide service, although not of equal function.

Under my view, in contrast, the calculation includes all 400 users and therefore there is a significant gap in the southern part of the township because 25% of existing users in the township cannot access the network. In my opinion, Provider A and/or its customers can show a significant gap and assert a prohibition claim.

Now imagine that because digital/PCS service is more advanced and popular, Provider A earns 10,000 new customers and the other three do not earn any additional customers because their technology is antiquated. I submit that under this scenario, the majority's holding today would undermine clear congressional policy.

**Appendix B**

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Appellant
v.
ZONING HEARING BOARD
OF EASTTOWN TOWNSHIP

No. 02-2194.

Argued Dec. 19, 2002.
Filed Feb. 12, 2003.
Rehearing Granted May 13, 2003.

Paul J. Lawrence (Argued), Jay Carlson, Preston Gates & Ellis, Seattle, WA, James C. Dalton, Christopher H. Schubert, Riley Riper Hollin & Colagreco, P.C., Paoli, PA, for Appellant.

Andrew D.H. Rau (Argued), Gawthrop, Greenwood & Halsted, A Professional Corporation, West Chester, PA, Paula Tripodi Kaczynski, Holsten & Associates, Media, PA, for Appellee.

Before SLOVITER, McKEE, and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This case raises several important questions concerning the burgeoning wireless telecommunications industry and the interpretation and application of the Telecommunications Act, 47 U.S.C. § 151 et seq. (TCA). Omnipoint is a wireless telecommunications provider that claims that there is a gap in the wireless telecommunications services available to remote users in Easttown Township, Pennsylvania. Omnipoint sued the Zoning Hearing Board (ZHB or Zoning Board) in the United States District Court for the Eastern District of Pennsylvania, claiming that the ZHB violated the prohibition and anti- discrimination provisions of the TCA by denying Omnipoint's request for a variance to locate a telecommunications tower in a residential district. *See* 47 U.S.C. § 332(c)(7)(B)(i). Furthermore, Omnipoint alleges that the ordinance under which its variance application was denied violates Pennsylvania law because it is either de jure or de facto exclusionary and fails to provide a "fair share" of Township land for telecommunications uses.

The District Court initially issued a writ of mandamus ordering the ZHB to grant a variance because the Court held that the ZHB decision relied exclusively on aesthetic concerns in its denial and not on substantial evidence supporting rejection. 72 F.Supp.2d 512 (E.D.Pa.1999). We vacated this writ and remanded the case to the District Court for reconsideration in light of *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir.1999). *See Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Township*, 248 F.3d 101 (3d Cir.2001) (Omnipoint I). On remand, Magistrate Judge Hart (MJ) denied Omnipoint's claims because he concluded that Omnipoint had failed to establish a "significant gap" or unreasonable discrimination under the TCA, or unconstitutional exclusion under Pennsylvania law. We affirm in part, vacate in part, and remand to the Magistrate Judge for further proceedings.

I.

Omnipoint is a licensed provider of wireless digital telephone communications services. As such, it uses a low power radio signal that is transmitted between a portable telephone and an Omnipoint antenna. The antenna then feeds the radio signal to an electronic device that is located nearby. In turn, that device connects the signal to an ordinary telephone line and routes it anywhere in the world. The combination of antenna and equipment is known as a cell site. Because of the low radio signal used by Omnipoint, the range of the cell site is quite small. For example, in Easttown Township, the maximum coverage of a cell site is two miles. When a wireless communication facility (WCF) is not available to cover a specific geographic area, customers who live in or travel through that area will experience unreliable service, dropped calls, or an inability to connect to the Personal Communication Service (PCS) network.[1]

Omnipoint sought to place a PCS tower in Easttown Township because of the gap in its wireless service. Omnipoint hoped to construct a 110-foot stealth flagpole designed PCS tower, 24 inches in diameter at the base and tapering to 16 inches at the top.[2] The fiberglass flagpole structure is designed to incorporate the telecommunications antennae which would be invisible from the outside. For this flagpole,

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[1] PCS differs from "cellular" technology in that it allows for the digital, wireless transmission of video, text, and messaging information in addition to the transmission of voices.

[2] WCFs must be mounted at a minimum height, which varies depending on the topography and vegetation of the region, the amount of service area to be covered, and other factors. The proposed tower would be located within a thirty-feet by thirty-feet enclosure, surrounded by an eight-foot high chain-link fence topped with barbed wire. *See ZHB Decision*, A 668.

Omnipoint leased space on land owned by the *Or Shalom Synagogue*, located in an area zoned as residential. Under Easttown's zoning ordinance, a communications tower is not a permissible use in residential districts and no residential structure may be higher than thirty-five feet.[3]

Omnipoint applied to Easttown Township's Zoning Hearing Board for use and height variances. It also challenged the validity of the zoning ordinance under Pennsylvania law and the TCA. Omnipoint alleged that the extant ordinance prohibited or effectively prohibited wireless service in violation of the TCA. ZHB held three public hearings on the applications at which a number of local citizens complained that the stealth tower would be an eyesore. ZHB issued a detailed written decision denying Omnipoint's application and stating that the ordinance was valid under both Pennsylvania and federal law.

The District Court granted Omnipoint's motion for summary judgment in part and ordered ZHB to grant Omnipoint's application. 72 F.Supp.2d 512 (E.D.Pa.1999).[4] We vacated that decision. On remand, the parties consented to have the case proceed in a bench trial before the U.S.M.J.

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[3] At the time of Omnipoint's zoning application, the ordinance did not explicitly provide for communications towers. Easttown has since amended its ordinance to allow cellular communications facilities as a conditional use in business and multi-family conditional use districts. *See* 72 F.Supp.2d at 514 n. 2.

[4] The District Court did not rule on Omnipoint's state law claims or its claim that the ZHB's decision violated 47 U.S.C. § 332(c)(7)(B)(i)(II) by prohibiting wireless service. Omnipoint's federal suit also included a civil rights claim under 42 U.S.C. § 1983 which Judge Katz denied because he ruled that the TCA's remedial scheme was sufficiently comprehensive to infer Congress' intent to foreclose § 1983 remedies. *See* 72 F.Supp.2d at 517. Judge Katz also found that Omnipoint had not shown a substantive due process violation. *Id.*

*See* 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.[5] The parties supplemented the record with expert reports and testimony regarding telecommunications services in Easttown. Omnipoint's principal witness, radio frequency engineer Paul Dugan, supervised drive tests in which approximately six hundred forty actual calls were made using eight cell phones of various providers. Dugan asserted that a signal strength of "negative 85 dbm" was necessary for reliable service.[6] On April 1, 2002, the MJ entered judgment in favor of ZHB. *See* 189 F.Supp.2d 258 (E.D.Pa.2002). The MJ found that Omnipoint had failed to establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network. The MJ placed significant weight on his finding that mobile phones other than Omnipoint's experienced problems only 1.96% of the time in Easttown. *See* 189 F.Supp.2d at 265. He also concluded that the ordinance was not exclusionary. Omnipoint timely appealed.[7]

II.

In *Penn Township*, we established a two-prong test to determine if the decision of a local zoning authority has "the effect of prohibiting the provision of personal wireless ser-

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[5] This case involves a mixture of federal and state claims. The federal claims arise under the TCA. The Magistrate Judge had jurisdiction over these claims pursuant to 28 U.S.C. § 1331. The Magistrate Judge also had jurisdiction to resolve Omnipoint's state statutory and constitutional challenges to the ordinance pursuant to 28 U.S.C. § 1367(a). *See* Omnipoint I, 248 F.3d at 108 n. 5.

[6] Omnipoint has not cited any Federal Communications Commission standard for call completion rates. *See* 189 F.Supp.2d at 264.

[7] The MJ's April 1, 2002 decision was a final order for the purposes of 28 U.S.C. § 1291.

vices." 47 U.S.C. § 332(c)(7)(B)(i)(II). A service provider must first "show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480. If this burden is met, the provider must still prove "that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.*

We now turn to the first prong of that test to determine whether there is a significant gap in the ability of remote users to access the national telecommunications network. We focus, therefore, on the service available to all remote users of all services in the specific area where Omnipoint asserts there is a significant gap in reliable service offered to remote wireless users by the existing providers. There must be a gap from the users' perspective, rather than from a particular provider's perspective. *See Nextel W. Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir.2002). A gap in the service provided by one provider is not sufficient for a prohibition of service claim under 47 U.S.C. § 332(c)(7)(B)(i)(II) if the telecommunications needs of users in the community as a whole are served.

Regrettably, the MJ misapplied the Penn Township test here.[8] The relevant figure to be analyzed in determining whether there is a significant gap is a consideration of all the existing remote users in the southern area of Easttown Township. Dugan testified: "I know without question that this area in Southern Easttown Township within the footprint of the proposed facility is currently lacking coverage." A consideration of all users must include existing Omnipoint users

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[8] We review the Magistrate's legal conclusions under a plenary standard. *See Warner-Lambert Co. v. BreathAsure, Inc.*, 204 F.3d 87, 89 n. 1 (3d Cir.1999).

at the time of the inquiry. Omnipoint is not a newcomer: it is already an existing licensee in Easttown Township. Omnipoint has an existing facility in the business district. This is not a case where a newcomer seeks to have its potential customers calculated as existing users. On the contrary, it is a provider who seeks to expand its service to existing customers by remedying a significant gap in the southern area of Easttown Township.

The proper test, therefore, for determining whether there is a significant gap is to look at all wireless telephone users, including the plaintiff's customers. Instead, the MJ looked only at non-Omnipoint users and found that non-Omnipoint users experienced problems only 1.96% of the time in Easttown Township. *See* 189 F.Supp.2d at 265. Based on this finding, the Magistrate Judge erroneously concluded that Omnipoint had failed to carry its burden of proving a significant gap.

The relevant figure in the Penn Township analysis is the aggregate, including Omnipoint users and including calls outside Easttown Township, but within each provider's WCF's coverage area. Under the proper standard, the MJ's 1.96% figure understates the actual call failure rate. Omnipoint places the number at approximately 5.5%.[9]

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[9] We reach this conclusion even though Omnipoint raised this argument for the first time in its Reply Brief. Generally, we do not consider arguments raised for the first time in a Reply Brief, but we do have the discretion to do so in exceptional circumstances. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 204-05 n. 29 (3d. Cir.1990). Here, since the Magistrate Judge erred in ignoring Omnipoint users in ascertaining whether there was a significant gap in the Township, we will consider Omnipoint's argument to avoid a miscarriage of justice. *Cf. Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1571 (1st Cir.1994) (Courts of Appeals may consider arguments raised for the first time in a Reply Brief if the arguments are "so compelling as virtually to insure the appellant's success" or if the arguments "must be ruled on to avoid a miscarriage of justice"); *see also Dufrene v. Browning-Ferris,*

Thus, Omnipoint may be able to carry its burden of showing a significant gap in service. *Cf. Cellular Tel. Co. v. Zoning Bd. of Adjustment of Harrington Park*, 90 F.Supp.2d 557, 565 (D.N.J.2000) (holding that a call failure rate of five to seven percent is a significant gap). The statement in Penn Township that proof of a relevant gap in service requires a provider "to include evidence that the area the new facility will serve is not already served by another provider," is somewhat puzzling in light of the preceding statement pertaining to a provider's proof that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. Standing alone, evidence that an area "is not already served by another provider" would seem to prohibit any provider from serving an area already served by another provider. It would promote monopolization and thus conflict with the pro-competitive objectives of the TCA. Because Penn Township relied heavily on "the most thoughtful discussion [it] found in the recent opinion" in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir.1999), we turn to that opinion for illumination.

The *Willoth* court described as "untenable" the proposition that "once personal wireless servers are available somewhere within the jurisdiction of a state or local government ... the state or local government could deny any further

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*Inc.*, 207 F.3d 264, 268 (5th Cir.2000) (Courts of Appeals may review for plain error, where the error is "clear" or "obvious" and affects "substantial rights."); *United States v. Wilson*, 962 F.2d 621, 627 (7th Cir.1992) (Courts of Appeals may consider an argument raised for the first time in a Reply Brief when an issue is serious and was overlooked by all concerned). In this case, the forfeited argument affects the fairness, integrity, and public reputation of the judicial proceedings. *Cf. Dufrene*, 207 F.3d at 268. Easttown Township will have adequate opportunity to respond on remand to the factual question of whether Omnipoint can show a significant gap under the correct legal standard.

application with impunity." *Id.* at 641. Thus, the court did not intend to foreclose proof of a significant gap in service because of the mere presence of one or more telecommunication providers in the jurisdiction. The puzzling Penn Township statement--evidence that the area served by the new facility "is not already served by another provider"--can only refer to an area without any significant gap in service by an existing provider.

Any other interpretation effectively would allow the existence of older, less functional cellular networks to impede the development of new, digital technologies like PCS and undermine competition in the telecommunications industry, thereby impairing Congressional policy. That policy, as expressed in TCA, seeks to create a "procompetitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 124.

Therefore, this case will be remanded to the Magistrate Judge for reconsideration under the legal standard set forth in this opinion.[10]

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[10] We are not persuaded by other evidence provided by Omnipoint to show a significant gap. The MJ held that Omnipoint's expert witness Dugan had failed to establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network. Dugan's own tests revealed that cell phone users in the area below negative 85 dBm nevertheless were able to make and receive calls using non-Omnipoint networks. *See* 189 F.Supp.2d at 264. We agree with the MJ's finding that Omnipoint did not carry its burden of showing that a signal strength of less than negative 85 dBm alone proves a significant gap. Dugan argued that the active portion of one of the tests that he conducted understates the problem with the services' reliability in that area. Omnipoint was responsible for correcting this proof problem by

III.

The Magistrate Judge found as a fact that Omnipoint's stealth flagpole was the least intrusive of the possible alternatives. *See* 189 F.Supp.2d at 262. We do not disturb this finding because it is not "clearly erroneous." *See Warner-Lambert Co.*, 204 F.3d at 89 n. 1. The Township cites the ZHB's original findings that Omnipoint considered few other sites and approached a horse farmer but did not follow up. ZHB's brief also criticizes Omnipoint for not engaging in studies to assess the visual and auditory impact of the flagpoles on the neighboring properties.

Magistrate Judge Hart found that the horse farmer was not interested in leasing the property and that Omnipoint considered other sites but did not choose them because Omnipoint was involved in unrelated litigation with the owners. *See* 189 F.Supp.2d at 262-63.[11] Thus, the MJ's finding that the stealth flagpole was the least restrictive alternative is not clearly erroneous.

IV.

In Pennsylvania, a land use restriction is a valid exercise of a municipality's police power when it promotes public health, safety, and welfare and is substantially related to the purpose it purports to serve. *See Kirk v. Zoning Hearing Bd. of Honey Brook*, 713 A.2d 1226, 1229 (Pa.Commw.1998).

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more closely replicating actual driving habits and equipment. *See* 189 F.Supp.2d at 264 n. 4.

[11] Moreover, the MJ could reasonably have concluded that a tower in the business district would not have remedied Omnipoint's gap because Omnipoint explained that the maximum coverage of its technology's cell sites in the Township is two miles.

A zoning ordinance is presumed valid and a party challenging it has a heavy burden of proving its invalidity. *See Penn Township*, 196 F.3d at 475. This presumption can be overcome by proof that the ordinance totally excludes an otherwise legitimate use. *See Farrell v. Worcester Township Bd. of Supervisors*, 85 Pa.Cmwlth. 163, 481 A.2d 986, 989 (1984).[12] Exclusionary ordinances take two forms: de jure and de facto. De jure exclusion exists where "the ordinance, on its face, totally bans a legitimate use." *Id.* De facto exclusion exists "where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality." *Id.*[13] The MJ held that Easttown Township Ordinance 160-80 was neither de jure nor de facto exclusionary. We agree.

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[12] A party seeking a use variance must show that the zoning restriction "inflicts unnecessary hardship on the applicant," and: (1) that there are unique physical circumstances or conditions peculiar to the property that create the hardship; (2) that because of these circumstances or conditions, there is no possibility that the property can be developed in conformity with the zoning ordinance; (3) that the applicant did not create the unnecessary hardship; (4) that the variance, if granted, would not alter the essential character of the area; and (5) that the variance, if granted, would represent the least modification possible to the regulation at issue. 53 P.S. § 10910.2 (2002).

[13] Exclusionary impact can invalidate an ordinance without evidence of exclusionary intent. *Overstreet v. Zoning Hearing Bd. of Schuylkill Township*, 152 Pa.Cmwlth. 90, 618 A.2d 1108, 1113 (1992). If a party rebuts the presumption of constitutionality by presenting sufficient evidence that an ordinance is exclusionary, the burden then shifts to the state to demonstrate that the zoning ordinance bears a substantial relationship to public health, safety and welfare. *Id.*; *see also Exton Quarries, Inc. v. Zoning Bd. of Adjustment of W. Whiteland Township*, 425 Pa. 43, 228 A.2d 169, 179 (1967) ("[A] zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.").

The ordinance is not facially exclusionary. As interpreted, it does not totally ban a legitimate use. Although the ordinance did not explicitly provide for telecommunications towers, the ZHB twice granted variances for telecommunications towers in the business district under a catch-all provision. 189 F.Supp.2d at 266. Omnipoint argues that a telecommunications tower does not fall within the catch-all provision because it is not of the same "general character" as any of the enumerated uses. However, the ZHB's interpretation of a municipality's zoning ordinance is entitled to weight because it reflects the construction of a statute by an entity charged with its execution and application. *See Sprint Spectrum v. Zoning Hearing Bd. of Mahoning Township*, 46 Pa. D. & C.4th 187, 192 (CCP 2000). Furthermore, simply because an ordinance does not expressly permit a use does not necessarily mean that it negates that use. *Cf. APT Pittsburgh Ltd. P'ship v. Lower Yoder Township*, 111 F.Supp.2d 664, 670 (W.D.Pa.2000). Otherwise, the TCA would force localities to enshrine every change in the telecommunications industry into local ordinances at an unrealistically rapid rate. *See id.*

The ordinance was not de facto exclusionary either. Omnipoint argues that the height restrictions contained in the zoning ordinance effectively prohibit the establishment of functional telecommunication facilities in Easttown Township. The ordinance contained a thirty-five foot height restriction in residential areas and a fifty-foot height restriction in business districts. *See* 189 F.Supp.2d at 267. The Magistrate Judge rejected this argument because the ZHB had previously granted height variances for communications facilities. *Id.* at 268; *see also Penn Township*, 196 F.3d at 476 (explaining that "to succeed in its exclusionary zoning claim ... [the Plaintiff] had to prove that no other telecommu-

nications provider, including itself, could build a functional tower ...").[14]

Omnipoint's alternative argument under the "fair share" principle also fails. The "fair share" principle applies when an ordinance only partially excludes a land use. An ordinance is exclusionary when a municipality fails to provide for its "fair share" of a legitimate land use such as multi-family dwellings. *See Surrick v. Zoning Hearing Bd. of the Township of Upper Providence*, 476 Pa. 182, 382 A.2d 105 (1977). Local political units must plan for and provide land-use regulations that meet the legitimate needs of all categories of people who may desire to live within its boundaries. *See id.* at 108.[15]

Omnipoint contends that Easttown Township fails to provide a "fair share" allowance for telecommunications uses. The B-Business District comprises only 1.1% of the

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[14] Omnipoint argues that Easttown Township cannot circumvent an otherwise exclusionary zoning ordinance by relying on the availability of a variance because of the high hurdles applicants must normally face to obtain a variance. *Cf. Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). This argument has greater force when plaintiffs seek a use variance, as in Girsh Appeal, rather than a height variance. *See* 189 F.Supp.2d at 268. A use variance is more burdensome to obtain than a height variance. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43, 47 (1998). Although Omnipoint sought both a use and a height variance, its argument that the ordinance is de facto exclusionary necessarily focuses on the ordinance's height restrictions. Thus, the MJ properly rejected this argument.

[15] In *Surrick*, the Pennsylvania Supreme Court articulated several factors to be considered in applying the "fair share" principle in the housing context: (1) whether the area is a logical area for development and population growth; (2) the present level of development; (3) population density data; (4) the percentage of total undeveloped land; and (5) the percentage of undeveloped land available for development. *See Surrick*, 382 A.2d at 110.

total area of Easttown Township.[16] [FN16] The relevant inquiry is whether Omnipoint has carried its "heavy burden" of showing that the needs of the community's residents are not being adequately served. *See Montgomery Crossing Assoc. v. Township of Lower Gwynedd*, 758 A.2d 285, 289 (2000); *Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 335 (1975). Other telecommunications providers have been able to serve the needs of their customers by placing towers within the business district. To overcome the presumption that the ordinance is constitutional, Omnipoint would have had to show a causal link between the small area of land zoned for business use and the community residents' inability to meet their needs. This, it failed to do.

V.

In its original complaint, Omnipoint alleged that ZHB's denial of Omnipoint's application constituted a violation of 47 U.S.C. § 332(c)(7)(B)(i)(I) because ZHB unreasonably discriminated against "providers of functionally equivalent services." Judge Katz denied this claim on the ground that Omnipoint had not shown discrimination, reasonable or otherwise. *See* 72 F.Supp.2d at 515 n. 3. In its cross-appeal of Judge Katz's decision, Omnipoint did not include the court's finding on the discrimination issue. *Omnipoint I*, 248 F.3d at 103. The MJ ruled that this discrimination issue was not properly before him because it had not been presented to the panel on the first appeal. *See* 189 F.Supp.2d at 270.

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[16] The Township contests this finding and argues that the business district is larger than Omnipoint asserted it was at trial. However, the MJ adopted the 1.1% figure as a fact, *see* 189 F.Supp.2d at 269, and this finding is not clearly erroneous.

Omnipoint argues that a cross-appeal is only required when the appellee advances an issue on appeal that aspires to alter the trial court's decision. *Cf. New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1205 (3d Cir.1991). Appellee is free to assert any alternative theory in support of the District Court's decision, even without a formal cross-appeal. *See id.*; *see also Scott v. Univ. of Delaware*, 601 F.2d 76, 91-92 (3d Cir.1979) (Adams, J., concurring).

The discrimination issue is properly before us and we now reject Omnipoint's argument on the merits. The TCA prohibits unreasonable discrimination against "providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). The TCA does not prohibit all discrimination against providers, only unreasonable discrimination. *See AT & T Wireless PCS v. Virginia Beach*, 155 F.3d 423, 427 (4th Cir.1998).

In *Nextel*, we explained that the purpose of the "unreasonable discrimination" language of § 332(7)(B)(i)(I) is to ensure that once the municipality allows the first wireless provider to enter, the municipality may not unreasonably exclude subsequent providers who similarly wish to enter and create a competitive market in telecommunications services. *See Nextel*, 282 F.3d at 264 n. 6. *Nextel* creates a two-part test for determining if a zoning board has unreasonably discriminated. First, the plaintiff must show that the relevant providers are functionally equivalent. Second, the plaintiff must show that the government body unreasonably discriminated. *Id.* at 266.

The equivalency of function relates to the telecommunications services the entity provides rather than to the technical particularities of its operations. *See id.* at 266 n. 13. We hold that Omnipoint is functionally equivalent to the

other telecommunications providers that were granted variances in Easttown Township.

Omnipoint's discrimination claim fails under the second part of the test. Permitting the erection of a communications tower in a business district does not compel the ZHB to permit a similar tower at a later date in a residential district. *See Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir.1999); *see also* H.R. Conf. Rep. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222 ("the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district"). The two communications towers that existed in Easttown at the time of Omnipoint's application were both located in areas zoned for business rather than residential use. *See* 72 F.Supp.2d at 515 n. 3. Thus, the ZHB's denial was not unreasonable and Omnipoint's § 332(c)(7)(B)(i)(I) challenge fails.[17]

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[17] Omnipoint's argument to the contrary focuses on the ugliness of the monopole previously approved by the ZHB for placement at the Berwyn Fire Company and the relative ease with which a variance was granted in that case. Even if the Berwyn Fire Company monopole is uglier than the proposed Omnipoint structure, that does not alter Omnipoint's intention to place its PCS tower in an area zoned for residential use. Furthermore, Omnipoint contests the ZHB's finding that the proposed flagpole would be a "blight" that would "loom over residential communities." Our role "is not to weigh the evidence contained in the record or substitute [our] own conclusions for those of the fact finder," but rather "to determine whether there is substantial evidence in the record as a whole to support the challenged decision." *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d Cir.1999); *Omnipoint I*, 248 F.3d at 106. Many community residents objected after seeing the plans and Omnipoint's land planning expert conceded that the tower would be "taller than most I have seen" in a residential area. *ZHB Decision*, A 670. The ZHB and the MJ both found that the 110-foot flagpole would be a blight that would loom over the residential community. This finding was supported by substantial evidence.

VI.

Omnipoint dedicates a significant portion of its brief to a direct attack on *Penn Township*. It points to the TCA, which seeks to create a "pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124; *see also Nextel*, 282 F.3d at 264 n. 6. Omnipoint argues that *Penn Township* undermines Congress' purpose of creating a competitive market for telecommunications services and has the effect of privileging first entrants with antiquated technology over subsequent entrants who could promote consumer welfare by creating competition and offering superior services. We decline to address this question because a panel cannot overrule existing Third Circuit precedent. *See* 3d Cir. Internal Operating Proc. 9.1.

VII.

Accordingly, the Magistrate Judge's order granting summary judgment for the ZHB is affirmed except as to its holding that there is no significant gap in telecommunications service in Easttown Township. As to this holding, we remand to the Magistrate Judge for further proceedings consistent with this opinion. Two-thirds of the costs are taxed against the appellant.

SLOVITER, Circuit Judge, Concurring.

I have reservations that the majority's decision remanding so that evidence of problems faced by Omnipoint users may be included in the determination whether there is a

significant gap may not be consistent with our holding in *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir.1999). If every licensee who seeks to construct a communications tower were able to compel recalculation of the evidence as to the availability of wireless communications services to remote users because its users have a dead spot in communications, the Township Zoning Boards may receive numerous such requests for a new study which may entail additional time and expense. Moreover, the residential areas may be populated by unsightly towers, however disguised. This situation was addressed by the Penn Township court as-follows:

> [I]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system. In order to show a violation of subsection 332(c)(7)(B)(i)(II) under *Willoth*, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.
>
> Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate

> less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

*Id.* at 480 (emphasis added) (footnote omitted).

Omnipoint appears to present precisely the situation encompassed by the above language in *Penn Township*. Moreover, the fact that Omnipoint failed to raise the issue of the gap calculation in its principal brief and reserved it for its reply brief when the Township Zoning Board did not have the opportunity to answer suggests that it was an afterthought. It is not clear whether this argument as to the gap calculation was raised before the Magistrate Judge at some time. It was not raised at the hearing and is not considered in his comprehensive opinion.

Nonetheless, I concur because it is clear from the majority's opinion that on remand the Township Zoning Board will have the opportunity to challenge Omnipoint's calculations. Under the circumstances, I urge the Magistrate Judge to give the Township ample leeway to do so.

## Appendix C

United States District Court,
E.D. Pennsylvania.

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
v.
ZONING HEARING BOARD OF EASTTOWN TWP.

CIVIL ACTION NO. 99-2080.

April 1, 2002.

James C. Dalton, Christopher H. Schubert, Riley, Riper, Hollin & Colagreco, Paoli, PA, for Omnipoint Communications Enterprises, L.P.

Andrew D.H. Rau, Gawthrop, Greenwood and Halsted, West Chester, PA, Paola F. Tripodi, Holsten & White, Media, PA, John S. Halsted, Gawthrop, Greenwood & Halsted, P.C., West Chester, PA, Jennifer L. Holsten, Holsten and Associates, Media, PA, for Zoning Hearing Bd. of Eastton Tp.

### OPINION AND JUDGMENT ORDER[1]

HART, United States Magistrate Judge.

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[1] Appended to this Opinion is a rhyming synopsis of the Telecommunications Act claim. With apologies to Ernest L. Thayer, the author of "Casey at the Bat," my law clerk, Anna Marie Plum, and I adapted the poem to address this issue.

Omnipoint, a subsidiary of VoiceStream Wireless, brought this suit alleging that the decision of Easttown Township's Zoning Hearing Board ("ZHB") denying it a permit to construct a telecommunications tower violated the Telecommunications Act, ("TCA"). In addition, Omnipoint challenges the zoning ordinance as exclusionary under the Pennsylvania Constitution. After consideration of the entire record judgment will be entered in favor of the Defendant. This Opinion and Order shall constitute the Court's findings of fact and conclusions of law.

**Facts and Procedural History**

On July 30, 1998, Omnipoint filed an application with the ZHB, seeking a Use Variance to erect a Personal Communication Service ("PCS") tower on property owned by Or Shalom Synagogue in Easttown Township at 835 Darby Paoli Road. In the alternative, Omnipoint challenged the validity of the township's zoning ordinance under the Pennsylvania Constitution and the TCA. The proposed facility would be a 110 foot stealth flagpole design, 24 inches in diameter at the base and 16 inches at the top. The telecommunications antennae would be contained inside the fiberglass flagpole structure. After holding three hearings on the application, the ZHB denied Omnipoint's application on March 17, 1999, finding, among other things, that Omnipoint had failed to establish a "hole" in service. (Findings, Memorandum, and Order, of the ZHB, 3/17/99, at 9).

Omnipoint sought review in the District Court.[2] On November 2, 1999, the Honorable Marvin Katz granted Omnipoint's motion for summary judgment, in part, and ordered the Defendant to grant the Plaintiff's application, permitting the installation of the stealth flagpole telecom-

[2] In the federal suit, Omnipoint did not challenge the ZHB's decision denying the use variance.

munications facility. On appeal, the Third Circuit found that Judge Katz did not have the benefit of the Circuit Court's decision in *APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 469 (3d Cir.1999). The court, therefore, remanded the case for further development of the record and reconsideration in light of the *Penn Township* decision.

On remand, the parties consented to have the case proceed before a United States Magistrate Judge and Judge Katz referred the case to me for all further proceedings. The parties supplemented the record with expert reports regarding the quality and level of wireless service in the area and I heard testimony on January 31, and February 1, 2002.

**TCA Claim**

In Count I of Omnipoint's Complaint, it contends that the ZHB's decision violates the TCA because the zoning ordinance "prohibit[s] or [has] the effect of prohibiting the provision of personal wireless service." 47 U.S.C. § 332(c)(7)(B)(i)(II). In order for the Plaintiff to establish a violation of this section of the TCA, the Third Circuit has determined that the service provider must establish (1) that there is a significant gap in cellular coverage; and (2) that the provider proposes to fill the gap in the least intrusive way.

> First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network.... Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve.

*Penn Township*, 196 F.3d at 480. *See also Nextel West Corp. v. Unity Township*, 282 F.3d 257 (3d Cir.2002). We will proceed to address these requirements in reverse order.

In discussing the manner in which the provider seeks to fill the gap, the Third Circuit has held that the provider must investigate alternatives.

> This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

*Penn Township*, 196 F.3d at 480.

Omnipoint argues that the stealth flagpole on the Synagogue site is the least intrusive means to fill the gap in cellular coverage. The township disagrees and contends that Omnipoint has failed to establish that it conducted a sufficient inquiry to determine whether its proposal is the least intrusive. Based on the evidence presented to the ZHB and the testimony presented at trial, we believe Omnipoint properly determined that the stealth flagpole is the least intrusive of all the alternatives.

At trial, Omnipoint presented the testimony of Eric Goldberg, the Manager of Engineering for VoiceStream Wireless. Mr. Goldberg described Omnipoint's efforts in investigating alternative sites for the telecommunications facility. The owners of a horse farm catercorner to the Synagogue site were not interested in leasing property to Omnipoint. In any event, the zoning issues in the residential area where the horse farm is located would be the same as those faced by Omnipoint in proposing to build a cell site on

the Synagogue property. (N.T. 1/31/02, 26). A PECo substation south of the Synagogue site was also unsuitable, due to a pending suit between PECo and Omnipoint. In addition, any telecommunications facility placed at the PECo substation would require a use variance, similar to the one Omnipoint sought for the Synagogue site. (N.T. 1/31/02, 27-28).

Mr. Goldberg also discussed the possibility of using the existing telephone poles along Route 252. However, these poles are owned by PECo, and each pole so used would also require an easement or lease with the land owner for the equipment that would be located on the ground. (N.T. 1/31/02, 29). Moreover, at the ZHB hearings, Edmond Vea, a radio-frequency engineer, (RF engineer), contracting with Omnipoint, discussed the problem with using repeaters, signal amplifiers, along the Route 252 corridor. Unfortunately, Mr. Vea explained that this would resolve only small coverage holes and would require a tower of at least 80 feet. (N.T. 9/16/98, 84). Finally, James Miller, AICP, PP, a land planner, explained that building a tower in the business district would not eliminate Omnipoint's coverage gap because the closest business district is over two miles away. (N.T. 1/31/02, 198-200).

In addition to presenting evidence to establish its inability to construct a tower elsewhere or provide service in an alternative manner, Omnipoint also presented evidence supporting its choice to build the stealth flagpole on the Synagogue site. First, Mr. Miller testified that, although located in a residential zone, the Synagogue property was an institutional use. He explained that institutional use properties are "generally a good choice because they tend to be larger properties and they have the size to accommodate the structure without infringing on neighboring uses." (N.T. 1/31/02, 220). Similarly, at the ZHB hearings, R. Douglas Stewart, a land planner, and Anton Dell'Orefice, a site loca-

tor, discussed the benefits of using the Synagogue property, including the fact that there is a mature tree line around the property. (N.T. 1/11/99, 275-81; 9/16/98, 13-18).

As for the proposed structure, Mr. Miller concluded that the stealth flagpole was the least intrusive means of providing wireless coverage to the area. (N.T. 1/31/02, 202). After reviewing photographs of other designs, including the monopole antenna on the Berwyn Fire Company, a lattice antenna structure, the artificial tree that has us all wondering about the vegetation in the Willow Grove area, and finally a giant steel cross on the property of St. Gabriel's Church,[3] the Court agrees. Therefore, we are satisfied that Omnipoint's proposal is the least intrusive.

We now switch our focus to the first prong of the *Penn Township* test-the burden of proving "a significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480. This inquiry does not hinge on a gap in the service provided by one communications company. Rather, the focus of the inquiry must be on the service available to all remote users in the specific area. *Id.* It requires a "gap from the user's perspective, rather than a particular provider's perspective." *Nextel*, at 265.

In an attempt to establish a "significant gap" in service in the relevant area of Easttown Township, Omnipoint presented the expert report and testimony of Paul Dugan, P.E., an RF engineer. Using testing equipment linking eight cellular phones to a laptop computer, Mr. Dugan conducted a mobile "baseline test," measuring signal strength and performance for each of the cellular providers in Easttown Township. (N.T. 1/31/02, 76-77, 79). A vehicle containing

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[3] The Court takes judicial notice that a stealth cross antenna would be an inappropriate lawn ornament for the Or Shalom Synagogue.

all of the equipment was driven throughout the township during a Friday rush hour and the computer initiated calls every 150 seconds. (N.T. 1/31/02, 81). The data was then plotted on several charts which Mr. Dugan described for the court.

Based on the results of this "baseline test," Mr. Dugan concluded that "a coverage hole currently exists for all licensees that is centered near Omnipoint's proposed communication facility." (Report of Dugan, at 3). In support of his conclusion, Mr. Dugan presented the court with the eight charts generated by plotting the computer-collected data. Each chart depicted the signal strength and performance of a different cellular provider-Cingular (analog); Cingular (digital); Verizon (analog); Verizon (digital); Nextel; AT & T; Sprint; and VoiceStream. (N.T. 1/31/02, 75). In Mr. Dugan's opinion, signal strength is the prerequisite to providing reliable wireless service, and a negative 85 dbm was the minimum signal strength necessary for reliable service. (N.T. 1/31/02, 90, 94). The signal strength depicted in the charts, therefore, is based on the negative 85 dbm standard, blue depicting negative 85 dbm or greater (denoting reliable service) and red depicting less than negative 85 dbm (unreliable service). Based on Mr. Dugan's standard, seven of the eight telephone providers show substantial areas of unreliable service.

The Court, however, finds several flaws in Mr. Dugan's assessment. First, Mr. Dugan failed to identify any regulatory standard requiring negative 85 dbm. (N.T. 1/31/02, 173). Instead, Mr. Dugan simply opined that based on his experience, a negative 85 dbm or greater signal strength is necessary to provide reliable service.

Mr. Dugan defined reliable service as the ability of a user to place a wireless call or access the national telephone network. (N.T. 1/31/02, 173). Unfortunately, Mr. Dugan

failed to establish a correlation between the negative 85 dbm standard and the actual ability of users to access the national telephone network. To the contrary, Mr. Dugan's own charts showed that most of the calls were initiated successfully, even when the signal strength was below negative 85 dbm. In fact, some of the dropped calls were in areas with allegedly reliable service. (Plaintiff's Exhibit 2, C, D). Like the engineering of a bumble bee, Mr. Dugan said it can't fly, yet his own tests revealed that cellphone users in the area can make and receive calls. Although Mr. Dugan explained that he would expect to lose a large number of calls in the heart of the coverage hole if he drove there for an extended period of time, (N.T. 1/31/02, 102), we note that the burden is on the Plaintiff to establish a significant gap in coverage. Mr. Dugan's expectations, notwithstanding, the evidence presented to this court fails to establish that signal strength of less than negative 85 dbm results in the inability of the remote user to access the national telephone network.[4]

Moreover, Mr. Dugan's test results actually support the reliability benchmark set by Plaintiff's own experts. Mr. Vea testified for Omnipoint before the ZHB. He said that a 98% call completion rate is the "limit of the industry standard." (ZHB Hearing Notes, 9/16/98, 76). Mr. Dugan testified that each phone made approximately eighty phone calls during his test drive for a total of 640 calls total. (N.T.

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[4] The Court is also unimpressed with Mr. Dugan's repeated admonition that the results were more favorable than the average customer would experience because each of the phones was connected to a roof-mounted antenna on the test vehicle. (N.T. 1/31/02, 78-79, 83, 110, 111, 115, 117). Mr. Dugan failed to establish what amount of signal deterioration would be attributable to the normal usage of a cellphone rather than having it attached to an antenna on the roof. Again, we note that the burden is on the plaintiff to prove a coverage gap. If Omnipoint realized that Mr. Dugan's roof antennae were producing better than average reception, it was up to the plaintiff to correct this proof problem by more closely replicating actual driving habits and equipment.

1/31/02, 89). He then drew our attention to the number of dropped calls, and instances where there was no service.[5] Reviewing the charts for the seven service providers, other than Omnipoint, we see only 10 dropped calls and one instance of no service. (Plaintiff's Exhibit 2, A E). Therefore, of the 560 calls made utilizing the other providers' services, only 11 or 1.96% experienced service problems. Omnipoint, on the other hand, had 11 dropped calls and 13 instances of no service. (Plaintiff's Exhibit 2, F). Using Mr. Dugan's figure of 80 calls attempted, Omnipoint had service related problems 30% of the time.

As a result, rather than establishing a significant gap overall, Mr. Dugan's analysis proved that only one provider, Omnipoint, was incapable of providing reliable service to its customers. Such a showing does not satisfy the *Penn Township* burden. "[I]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *Penn Township*, 196 F.3d at 480. Having failed to establish a significant gap, Omnipoint has failed to prove the ZHB's denial of the variance had the effect of prohibiting the provision of wireless service.

**Exclusionary Zoning**

Omnipoint next claims that the zoning ordinance is exclusionary. The state courts and the Third Circuit have repeatedly stated that Pennsylvania law presumes the validity of zoning ordinances. *Penn Township*, 196 F.3d at 475; *Sprint Spectrum, L.P. v. Zoning Hearing Board of Mahoning Township*, 46 Pa.D. & C.4th 187, 191 (Pa.Com.Pl.2000)

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[5] Mr. Dugan explained that "fast busy" and "reorder" are functions of capacity, in essence, too many people using their phones at the same time. (N.T. 1/31/02, 101-02). "Connect time out" occurs for any number of reasons when the cellphone cannot connect to the national network properly. (N.T. 1/31/02, 101).

(citing *Sullivan v. Board of Supervisors of Lower Makefield Twp.*, 22 Pa.Cmwlth. 318, 348 A.2d 464 (1975)). In order to sustain its burden, the plaintiff must show that the ordinance totally excludes a particular use. *Penn Township*, 196 F.3d at 475; *Sprint Spectrum*, 46 Pa.D. & C. at 192.

In pressing its exclusionary zoning claim, Omnipoint argues that Easttown Township's zoning ordinance is exclusionary both de jure and de facto. De jure exclusion occurs when an "ordinance, on its face, totally bans a legitimate use." *Penn Township*, 196 F.3d at 475 (quoting *Farrell v. Worcester Twp. Bd. of Supervisors*, 85 Pa.Cmwlth. 163, 481 A.2d 986, 989 (1984)). De facto exclusion exists "where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality." *Id.*

**1. De Jure Exclusion**

In support of its claim of de jure exclusion, Omnipoint argues that the zoning ordinance in effect at the time of its variance application did not make any provision for telecommunications towers. The township, on the other hand, contends that telecommunications towers are permitted by special exception in the B Business District pursuant to the catch-all provision of § 1101.16.

Section 1101.16 provides:

> USE REGULATIONS. A detached or semi-detached building may be erected or used and a lot may be used or occupied for any use permitted in any other District and for the following purposes and no other:
>
> . . . . .
>
> 16. Any use of the same general character as those enumerated above when authorized as a

> Special Exception by the Zoning Hearing Board, provided the Zoning Hearing Board shall find:
> a. That the proposed use is of the same general character.
> b. That the proposed use would cause no undue traffic congestion nor result in the emanation of heat, glare, noise, noxious odors or any other nuisance on or off the premises.

Easttown Township Ordinance 160-80 (rev.8/30/85), § 1101.16.

At trial, Omnipoint contended that a telecommunications use was not of the same general character as any of the enumerated uses in § 1101. (N.T. 2/1/02, 6). Therefore, construction of a telecommunications tower did not fall into Subsection 16 of § 1101, commonly referred to as the catch-all provision. Omnipoint presented the testimony of James Miller, a land planner. Mr. Miller testified that, based upon his reading of the ordinance in existence at the time of Omnipoint's variance request, wireless communications facilities were not a permitted use anywhere in Easttown Township. (N.T. 1/31/02, 184-85). Mr. Miller explained that the catch-all provision required a use of the same general character as that of one of the fifteen enumerated uses. (N.T. 1/31/02, 187-88). He then reviewed each of the fifteen enumerated uses and explained why a telecommunications facility did not fall into any of them. (N.T. 1/31/02, 188-91).

In response, the township called Gene Williams, Easttown Township's Manager and Zoning Officer. As zoning officer, Mr. Williams included among his duties the enforcement of Easttown's zoning ordinance. (N.T. 2/1/02, 9). Mr. Williams disagreed with Mr. Miller's construction of the catch-all provision to prohibit telecommunications facilities. (N.T. 2/1/02, 27). He directed the court to the ZHB's

action in 1990, granting an application for a variance by the Berwyn Fire Company to erect a 120 foot tower, and to Metrophone's later request for a special exception to install an antenna on the same tower. Mr. Williams explained that the only provision under which Metrophone could have proceeded, and the special exception could have been granted, was the catch-all provision of § 1101.16. (N.T. 2/1/02, 16).

Similarly, Mr. Williams reviewed the ZHB's action on a 1995 variance and special exception request by the Berwyn Fire Company and Bell Atlantic. The fire company sought to replace the 120 foot tower with a 140 foot tower and Bell Atlantic sought to place an antenna on the structure. In its moving papers, counsel identified Bell Atlantic's request as falling within the personal service provision of § 1101.7 of the zoning ordinance, or the catch- all provision. (N.T. 2/1/02, 24). In approving the variance and special exception, the ZHB found that the proposed tower constituted a special exception under the zoning ordinance. Moreover, in denying Omnipoint's variance request, the ZHB acknowledged that it has interpreted the ordinance to permit telecommunications towers in the B Business district. (Findings, Memorandum, and Order, Zoning Hearing Board of Easttown Township, Mar. 17, 1999, at 22).

From this evidence, it is clear to the court that the ZHB construes the catch-all provision to allow telecommunications facilities, a fact we must consider in determining whether the ordinance is exclusionary. *See Sprint Spectrum*, 46 Pa. D. & C.4th at 192 ("A zoning hearing board's interpretation of its own municipality's zoning ordinance is entitled to weight because it reflects the construction of a statute by an agency charged with its executions and application.... This is particularly true where the board's interpretation ... is a permissive one rather than a restrictive one.").

In considering Omnipoint's exclusion, de jure claim, we are guided by the opinion of the Honorable D. Brooks Smith in *APT Pittsburgh Limited Partnership v. Lower Yoder Township*, Cambria County, 111 F.Supp.2d 664, 670 (W.D.Pa.2000).

> Simply because an ordinance does not expressly permit a use does not mean that it prohibits that use. If localities were required to detail in their zoning ordinances every possible land use, they would have time to do little else. It is difficult enough for experts in the telecommunications industry to keep up with the changes in the industry, where technology has changed so rapidly in a few short years. Requiring local zoning officers to do the same--and to assure that these changes are enshrined in local ordinances--is asking for more than the TCA requires.

*Id.*

Although Judge Smith was reviewing a prohibition under the TCA, we believe his reasoning is equally applicable to an exclusionary zoning claim. While Easttown's zoning ordinance does not explicitly provide for telecommunications facilities, it is clear that the ZHB has considered the B Business district to permit such a use. We find, therefore, that the ordinance does not exclude telecommunications facilities on its face.[6]

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[6] With the advent of "enhanced 911," (N.T. 1/31/02, 19), as discussed by Eric Goldberg, the Manager of Engineering for VoiceStream, it is possible that an argument could be made that the telecommunications use falls into the municipal use provided for by § 1101.3. Neither side considered this possibility in its submissions and we do not believe that sufficient evidence was presented concerning the FCC's requirements to fully assess such an argument.

## 2. De Facto Exclusion

Even though we have found that Easttown's zoning ordinance is not de jure exclusionary, it may still be considered exclusionary if, when applied, it prohibits a use throughout the municipality. *Penn Township*, 196 F.3d at 475 (citing *Farrell*, 481 A.2d at 989). On this point, Omnipoint urges that the height restrictions contained in the zoning ordinance effectively prohibit the establishment of functional telecommunication facilities in the township.

The regulations in effect at the time of Omnipoint's variance request contained a 35 foot height restriction for residential areas and a 50 foot height restriction in the Business Districts. Easttown Township Ordinance 160- 80 (rev.8/30/85), § § 303, 1102(4). Mr. Miller explained that the foliage and topography of the area would render an antenna at 50 feet ineffective. (N.T. 1/31/02, 195-96). Easttown Township provided no contrary evidence.

The problem with Omnipoint's argument, however, is that height variances for communications facilities are given by the ZHB. The Third Circuit made it clear that in order to be considered exclusionary, the zoning ordinance must exclude the construction of telecommunications facilities altogether.

> In order to overcome the presumption of [the zoning ordinance's] constitutionality, [the Plaintiff] must show that the ordinance "effectively excludes the construction of any communications towers throughout the Township." *Penn Township*, 196 F.3d at 476. In other words, to succeed on its exclusionary zoning claim, [the Plaintiff] must prove that "no telecommunications provider, including

> itself, could build a functional tower" in the [Township]. *Id.* at 476.

*Lower Yoder*, 111 F.Supp.2d 664, 679. In this case, the ZHB previously granted height variances for the erection of two telecommunications towers on the Berwyn Fire Company. In 1990, a variance was granted to allow a 120 foot tower and co-location by Metrophone, and in 1995, the variance allowed a 140 foot tower and co-location by Bell Atlantic. Again, the Court is reminded of the engineering of a bumble bee. Omnipoint argues that the zoning ordinance forecloses the construction of telecommunications towers. Yet, there sits one larger than life, square atop the Berwyn Fire Station in the middle of downtown Easttown.

We are unpersuaded by the Plaintiff's reliance on *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). In *Girsh*, the Pennsylvania Supreme Court found a zoning ordinance in Nether Providence Township unconstitutional because it made no provision for apartments except by variance. The Honorable Samuel J. Roberts explained:

> It is settled law that a variance is available only on narrow grounds, i.e., where the property is subjected to an unnecessary hardship, unique or peculiar to itself, and where the grant thereof will not be contrary to the public interest. The reasons to justify the granting of a variance must be substantial, serious and compelling. In light of this standard, appellee's land-use restriction in the case before us cannot be upheld against constitutional attack because of the possibility that an occasional property owner may carry the heavy burden of proving sufficient hardship to receive a variance.

*Girsh Appeal*, 437 Pa. at 240-41, 263 A.2d 395 (internal citation omitted). Omnipoint argues that Easttown Township cannot circumvent an otherwise exclusionary zoning ordinance by relying on the availability of variances.

The flaw in Omnipoint's argument is that Justice Roberts was discussing a use variance, not a dimensional variance, "an important distinction" noted by the Pennsylvania Supreme Court more recently. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 257, 721 A.2d 43 (1998). In *Hertzberg*, the court held that "the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation." *Id.* Moreover, Justice Roberts drew the same distinction in *Girsh* when he concluded by stating:

> It is not true that the logical result of our holding today is that a municipality must provide for all types of land use. This case deals with the right of people to Live on land, a very different problem than whether appellee must allow certain industrial uses within its borders.

*Girsh*, 437 Pa. at 245, 263 A.2d 395.

Finally, Omnipoint urges that Easttown Township does not provide a "fair share" allowance for telecommunications uses. The "fair share" principle requires "local political units to plan for and provide land-use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries." *Surrick v. Zoning Hearing Board of the Township of Upper Providence*, 476 Pa. 182, 189, 382 A.2d 105 (1977).

The ZHB argues that the "fair share" analysis is only applicable to land "available for development." (Post Trial Memorandum of Defendants, at 4- 5). Since the parcel is already developed, housing a synagogue, the Defendants argue that the "fair share" analysis is not germane to our discussion. We find no such limitation in the principle, itself, or in the caselaw. Moreover, the Court of Common Pleas recently applied the "fair share" principle to a case involving a telecommunications tower in Mahoning Township. *Sprint Spectrum L.P. v. Zoning Hearing Board of Mahoning Township*, 46 Pa. D. & C. 4th 187 (2000).

In *Surrick*, the Pennsylvania Supreme Court suggests several factors to be considered in applying the "fair share" principle: (1) whether the area is a logical area for development and population growth; (2) the present level of development; (3) population density data; (4) the percentage of total undeveloped land; and (5) the percentage of undeveloped land available for development. *Surrick*, 476 Pa. 182, 192, 382 A.2d 105 (1977). Omnipoint urges, and we agree, that as a suburb of Philadelphia, the Route 252 Corridor in Easttown Township is a logical area for population growth and development, especially in the context of the use of cellular phones. (N.T. 1/31/02, 16- 21; Miller Report, at 2).

Omnipoint correctly observes that, if the Court accepts that cell sites are permissible in the B-Business District of Easttown Township, which we have, the B-Business District comprises only 1.1% of the total area of the township. (Omnipoint's Memorandum of Law, at 22). Since the area in which cell sites can be located is disproportionately small, Omnipoint claims it has established that Easttown Township's zoning ordinance violates the "fair share" analysis.

However, Omnipoint's argument neglects to address the underlying purpose of the "fair share" doctrine--the needs

of the community. In *Surrick*, itself, the Pennsylvania Supreme Court noted that, "[o]ur primary concern now is centered upon an ordinance's exclusionary impact." *Surrick*, at 193, 382 A.2d 105. Therefore, like the analysis under the TCA, we must look to the impact on the cellphone use in the township.

> [I]t is not sufficient, absent a showing of total prohibition, for a developer to merely point out that a relatively small area of the municipality is zoned for commercial use without any proof that the needs of the community's residents are not being adequately served.

*Montgomery Crossing Associates v. Township of Lower Gwynedd*, 758 A.2d 285, 289 (Pa.Cmwlth.2000) (quoting *Sullivan v. Board of Supervisors of Lower Makefield Township*, 22 Pa.Cmwlth. 318, 348 A.2d 464, 467 (1975)).

As previously discussed, we do not find that the evidence presented by Omnipoint supports the conclusion that the cellphone users in Easttown Township are unable to access the national network. Excluding Omnipoint, itself, the seven other providers suffered dropped calls or no service only 1.96% of the time and that in the very area where Omnipoint argues that service is poorest. *See infra*, at 7-8. Therefore, Omnipoint has failed to establish that the residents of Easttown Township or the travelers through the township suffer a negative impact as a result of the zoning ordinance.

**Discrimination Claim**

In its Complaint, Omnipoint also alleged that the denial of the application by the ZHB constituted a violation of 47 U.S.C. § 332(c)(7)(B)(i)(I), which prohibits unreasonable discrimination against "providers of functionally equivalent services." In denying this claim, Judge Katz

stated, "Omnipoint has not advanced any evidence of discrimination, unreasonable or otherwise, by the ZHB. Therefore, the Court finds that the ZHB did not violate section 332(c)(7)(B)(i)(I)" *Omnipoint v. Zoning Hearing Bd. of Easttown Township*, 72 F.Supp.2d 512, 515 n. 3 (E.D.Pa.1999). In its cross-appeal of Judge Katz's decision, *Omnipoint* did not include the court's finding on the discrimination issue. *Omnipoint v. Zoning Hearing Bd. of Easttown Township*, 248 F.3d 101, 103 (3d Cir.2001). As the claim was not presented to the Circuit Court on appeal, it is not properly before this court on remand.

**Civil Rights Claim**

Finally, in its Complaint, Omnipoint argues that the ZHB's violation of the TCA also results in a violation of the Civil Rights Act. As the Third Circuit noted, "[t]o the extent Omnipoint claims that the ZHB, acting under color of state law, violated its rights under the TCA, the issues raised need not be addressed until such a violation has been established." *Omnipoint*, 248 F.3d at 109-10. Since we have found no violation of the TCA, Omnipoint has not established a civil rights violation.

An appropriate order is attached to this Memorandum.

APPENDIX

MIGHTY DUGAN TAKES THE STAND

The outlook wasn't brilliant for the Omnipoints that day,
They'd won round one, but now the Circuit Court was in their way.
And when the Thirds addressed the case, the judges all pronounced,
Penn Township is the standard, so to us the case got bounced.

A pole had been the object of their variance request,
So when the Township nixed it, on to court they took their quest.
The District Court agreed, and said the flag pole must arise
But the Circuit said, no way, without some gaps in them there skies.

The TCA's got remedies, but it's also got a trap.
To build that pole in Easttown, you must show a coverage gap.
And not just for your customers, its got to hurt them all.
Providers up and down the band must fail to place a call.

To meet the task of proving this, Paul Dugan took the stand.
With charts and maps and photographs in each and every hand.
He offered them to satisfy the burden of his proof
That gaps appeared despite antennae rising from his roof.

He said if we see red, that's bad--"neg 85" or less.
And if that were the standard, coverage seemed to be a mess.
For many of his maps revealed red splotches everywhere,
And even two that showed some blue had red in their fair share.

The problem is, the law don't say "neg 85's" the test.
It's access to the network that must fail to be the best.
But, using real completed calls--like bumblebees with wings,
Although folks claim they cannot fly, that phone still ding-a-lings.

It's not the signal strength that counts, it's "can you make a call?"
And looking at poor Dugan's charts, he almost made them all.
Verizon, Sprint and Cingular, and all the others, too,
Save Omnipoint the plaintiff, had seen their calls go through.

Oh, somewhere in this favored land, there stands a tower high,
With happy cell providers grabbing signals from the sky.
The TCA allowed those folks to sprinkle poles about.
But there's no new pole in Easttown, Mighty Dugan has struck out.

ORDER

AND NOW, this _____ day of __ 2002, upon consideration of the evidence and arguments presented by both sides at trial, the evidence presented to the Zoning Hearing Board of Easttown Township, the post-trial submissions, and for the reasons stated in the accompanying Opinion, which shall constitute the findings of fact and conclusions of law of this Court, IT IS HEREBY ORDERED that JUDGMENT IS ENTERED in FAVOR of the DEFENDANT and AGAINST the PLAINTIFF.

**Appendix D**

United States District Court,
E.D. Pennsylvania.

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Plaintiff,
v.
ZONING HEARING BOARD OF EASTTOWN
TOWNSHIP, Defendant.

CIVIL ACTION NO. 99-2080.

Nov. 2, 1999.

Christopher H. Schubert, Riley, Riper, Hollin & Colagreco, Paoli, PA, for Plaintiffs.

Jennifer L. Holsten, Holsten and Associates, Media, PA, for Defendants.

MEMORANDUM AND ORDER

KATZ, Senior District Judge.

Omnipoint Communications Enterprises, L.P. ("Omnipoint") seeks to place a 110-foot communications tower in Easttown Township. At the time of its application to the Township's Zoning Hearing Board ("ZHB"), such a structure was not permitted under the Township's zoning ordinance at the site selected by Omnipoint. The ZHB denied Omnipoint's application, which challenged the validity of the zoning ordinance or, in the alternative, sought

several variances. Omnipoint then filed suit in this court, pursuant to the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 332(c)(7)(B)(v), challenging that decision. Now before the court are the parties' cross motions for summary judgment.

## I. Background

Omnipoint is a provider of telephone wireless communications services that use digital technology.[1] Omnipoint entered into a lease with the Or Shalom Synagogue, located at 835 Darby Paoli Road (Route 252), in Easttown Township, to place a communications tower and supporting equipment on the synagogue's property. The tower that Omnipoint proposes utilizes what it terms "stealth" technology. The tower would be a single pole, approximately twenty-four inches at the base and tapering to sixteen inches at the top. Omnipoint's antennas would be located within the cylinder of the tower, rather than attached to the exterior of the structure. *See* Pl.Ex. 5 at 6 (Findings, Mem. and Order, App. No. 331, March 17, 1999) ("ZHB Order").

According to Omnipoint, the tower is necessary because of a "gap" in its wireless service along Route 252. The synagogue is located in an area zoned as AA residential; under the Township's zoning ordinance, a communications

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[1] In Omnipoint's system, a low power radio signal is transmitted between a portable telephone and an Omnipoint antenna. The antenna then feeds the radio signal to an electronic device located nearby, which connects the signal to an ordinary telephone line and then routes it anywhere in the world. The combination of antenna and equipment is known as a "cell site." Because of the low radio signal used by Omnipoint, the range of a cell site is relatively small. According to Omnipoint, in Easttown Township, the maximum coverage of a cell site is two miles.

tower is not a permissible use in such a district.[2] *See* Pl.Ex. 6 at 8 (Easttown Township Ord. No. 160-80, art. III (1980)). In addition, in an AA residential area, no structure may be higher than thirty-five feet. *See id.* at 9.

Omnipoint submitted an application to the ZHB in which it alleged that the Township's ordinance prohibited or effectively prohibited wireless services in violation of the TCA. It also charged that the ordinance was invalid under Pennsylvania law. In the alternative, Omnipoint requested a number of variances from the ordinance, including use and height variances. *See* Def. Ex. C (Application of Omnipoint).

The ZHB held three public hearings regarding Omnipoint's application--on September 16, 1998, October 28, 1998, and January 11, 1999--and issued a detailed written decision denying the application on March 17, 1999. The ZHB found that the ordinance was valid under both Pennsylvania and federal law.

## II. Discussion

Omnipoint raises several grounds for a ruling in its favor in its motion for summary judgment. First, it argues that the Board's decision violated the TCA. Second, it argues that the decision violated applicable state law. Finally, it alleges a civil rights violation under section 1983. It requests that the court reverse the decision of the ZHB and issue a writ of mandamus ordering the ZHB to grant Omnipoint's application. The ZHB, in turn, requests summary judgment on these points and asks the court to uphold its decision.

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[2] At the time of Omnipoint's application, the ordinance did not specifically provide for communications towers. The Township has amended its ordinance to allow cellular communications facilities as a conditional use in business and multi-family conditional use districts. *See* ZHB Order at 3.

## A. The Telecommunications Act

The TCA was enacted, in part, to balance the need to establish a national network of wireless communications facilities with preservation of local authority over zoning decisions. *See Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, 181 F.3d 403, 406-07 (3d Cir.1999). To that end, the TCA provides limited grounds for appeal to a federal district court from an adverse zoning decision regarding the siting of a telecommunications facility. *See* 47 U.S.C. § 332(c)(7); *Pine Grove*, 181 F.3d at 406-07. The TCA requires that a decision denying a request to place or modify a personal wireless services facility be "in writing and supported by substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii). Substantively, the TCA mandates, inter alia, that a state or local government's regulation of such services shall not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 337(c)(7)(B)(i)(II).

According to Omnipoint, the ZHB's decision was not supported by substantial evidence in violation of section 332(c)(7)(B)(iii). Omnipoint also contends that the Township's zoning ordinance and the ZHB's denial of its application have the effect of prohibiting telecommunications services in violation of section 332(c)(7)(B)(i)(II) of the TCA.[3]

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[3] In its complaint, Omnipoint also alleges that the ZHB's decision violated section 332(c)(7)(B)(i)(I) of the TCA, which prohibits unreasonable discrimination against "providers of functionally equivalent services." *Id.* While Omnipoint does not develop this contention in its motion for summary judgment, the court will address it briefly. As the statute states, the TCA does not prohibit all discrimination against providers, only that which is unreasonable. *See AT & T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 427 (4th Cir.1998). Permitting the erection of a communications tower in a business district does not mean that a zoning authority must then allow a similar tower in a

### 1. Substantial Evidence

The ZHB's decision upholding the validity of the zoning ordinance was not supported by substantial evidence. This standard of review of a local authority's zoning decision under the TCA is "the same standard applied to federal administrative decisions." *Pine Grove*, 181 F.3d at 408 (citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and punctuation marks omitted). In evaluating a zoning decision, a court views the entire record and takes into account evidence unfavorable to the agency. *See id.*

Section 332(c)(7)(B)(iii) is not intended to supplant the substantive standards to be applied under state or local law. *See id.* at 408 n. 4 (applying state and local law in deciding whether the ZHB's decision was supported by substantial evidence); *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus*, 24 F.Supp.2d, 359, 365 (D.N.J.1998). However, a decision is reviewed under the substantial evidence test, regardless of what evidentiary burden is mandated by state law. *See Pine Grove*, 181 F.3d at 408 n. 5 (rejecting argument that defendants did not meet the burden required by state law and reviewing decision under substantial evidence standard).

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residential district. *See Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir.1999) (citation omitted). It is undisputed that the two communications towers that existed in the Township at the time of Omnipoint's application were located in areas zoned for business rather than residential use. *See* Pl.Ex. 3 at 347 (ZHB Hearing of Jan. 11, 1999). Omnipoint has not advanced any evidence of discrimination, unreasonable or otherwise, by the ZHB. Therefore, the court finds that the ZHB did not violate section 332(c)(7)(B)(i)(I).

In Pennsylvania, a zoning ordinance is presumed valid, and a party challenging one has the burden of establishing its invalidity. *See Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 335 (1975). Challenges to an ordinance are reviewed under a substantial due process analysis: a restriction on the use of land is a valid exercise of a locality's police power when it promotes public health, safety, and welfare and is substantially related to the purpose it purports to serve. *See Kirk v. Zoning Hearing Bd. of Honey Brook*, 713 A.2d 1226, 1229 (Pa.Commw.1998). When faced with a challenge to the validity of its ordinance, Pennsylvania law dictates that a zoning board is to consider, among other factors, the impact of a proposal on "the preservation of agricultural and other land uses which are essential to the public health and welfare." 53 P.S. § 10916.1(a)(5)(v). Zoning decisions based solely on aesthetic reasons are not a legitimate exercise of a locality's power to protect the general welfare; decisions which link aesthetics and property values, however, are acceptable. *See Berk v. Wilkinsburg Zoning Hearing Bd.*, 48 Pa.Cmwlth. 496, 410 A.2d 904, 906 (Pa.1980); *Berman v. Board of Comm'rs of Lower Merion Township*, 147 Pa.Cmwlth. 405, 608 A.2d 585, 590 (Pa.Commw.1992); *White Advertising Metro v. Zoning Hearing Bd. of Susquehanna Township*, 70 Pa.Cmwlth. 308, 453 A.2d 29, 35 (Pa.Commw.1982).

Omnipoint presented evidence that its proposed use would not be detrimental to the health, safety, and general welfare of the Township. An Omnipoint expert testified that the tower was structurally sound and would not pose a threat to safety. *See* Pl.Ex. 1 at 46-51 (ZHB Hearing of Sept. 16, 1998). Although the TCA forecloses a zoning board from considering the health effects of a wireless facilities radio emissions in its decision, *see* 47 U.S.C. § 332(c)(7)(B)(iv), Omnipoint also presented expert testimony that the radio signals from the tower would not pose any threat to the health and safety of the community. *See* Pl.Ex. 2 at 231-34 (ZHB

Hearing of Oct. 28, 1998). One of Omnipoint's witness testified that the communications facilities would be unmanned, would not need any water or sewer connections, and would only require monthly maintenance visits. *See* Pl.Ex. 1 at 27-28. A professional land planner testified that the proposed tower would be a use consistent with the surrounding neighborhood and would not affect the area's residential character. *See* Pl.Ex. 3 at 276-77 (ZHB Hearing of Jan. 11, 1999).

In rejecting Omnipoint's challenge to the ordinance, the ZHB relied only on aesthetic considerations. The ZHB found that the tower would create "significant aesthetic and compatibility issues within the Township's AA residential district, where the proposed use was not permitted." ZHB Order at 9. The ZHB found credible the "concerns of the Township citizenry as to the blight of a tower, higher than any surrounding tree or structures, looming over residential communities." *See id.* at 5; *accord* Pl.Ex. 3 at 243, 321-23 (comments by Township residents regarding the visual effect of the tower on the neighborhood). The Board dismissed the testimony of Omnipoint's land planning expert that the tower would not negatively affect the neighborhood. In so doing, Board relied upon the fact that the expert did not view the proposed site from the surrounding properties and his admission that, at 110 feet, the proposed tower was taller than those usually found in residential districts. *See* ZHB Order at 5.

The ZHB, as a finder of fact, may weigh the credibility of the testimony and evidence before it. However, its decision that the ordinance validly prohibited a communications tower in AA residential districts was based solely on the negative aesthetic impact of the tower. The ZHB did not make any findings that the tower would affect the health, safety, or general welfare of the Township in any manner other than that of aesthetics. Such a finding is not sufficient to uphold the validity of the ordinance.

The evidence supporting the ZHB's conclusion was also not substantial since the only counter to Omnipoint's land planning expert regarding the effect of the tower was the general concerns voiced by the Township's residents. A few speculative concerns regarding aesthetics and property values do not amount to substantial evidence. *See Pine Grove*, 181 F.3d at 409 (holding that the general assertions of neighbors that the tower would be visible above the tree line and would damage property values did not constitute substantial evidence). Even if the testimony of Omnipoint's expert is discounted, the evidence before the Board regarding the negative visual effect of the tower amounted to " 'a few generalized expressions of concern with "aesthetics" [which] cannot serve as substantial evidence.'" *Pine Grove*, 181 F.3d at 409 (quoting *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir.1999)). Such comments are not sufficient to sustain the ZHB's decision under the TCA.

**2. Prohibiting Service**

Because the court finds that the Township has violated the TCA in that its decision was not supported by substantial evidence, it is unnecessary to determine whether the Township or the Board prohibited or had the effect of prohibiting wireless services in violation of section 337(c)(7)(B)(i)(II) of the TCA.

**B. State Law Claims**

Because the court finds that the ZHB violated the TCA, it does not rule on Omnipoint's separate claim that the Board's decision violated state law.

## C. Civil Rights Act

The Board's violation of the TCA does not give rise to a cause of action under section 1983. The TCA's remedial scheme is "sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy." *Omnipoint v. Newtown Township*, Civ. A. No. 98-5171, 1999 WL 269936, at *7- 10 (E.D.Pa. Apr. 29, 1999); *but see Omnipoint v. Zoning Hearing Bd. of Chadd's Ford Township*, Civ. A. No. 98-3299, 1998 WL 764762, at *4-10 (E.D.Pa. Oct. 28, 1998) (holding that a section 1983 cause of action is available); *Cellco Partnership v. Hess*, Civ. A. No. 98-3985, 1999 WL 178364, at *5-8 (E.D.Pa. March 30, 1999) (holding same).

Omnipoint's claim for section 1983 relief for a violation of substantive due process is also denied. Such relief is available where a board's decision was motivated by "bias, bad faith, improper motive, racial animus, or the existence of partisan political or personal reasons," *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir.1991), or the decision is arbitrary and capricious. *See Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217-18 (3d Cir.1988). Omnipoint argues that because its decision was not supported by substantial evidence, the Board acted in an arbitrary and capricious manner. While the ZHB accorded too much weight to the visual impact of the tower, such an error does not render its actions arbitrary and capricious. *See Omnipoint v. Penn Forest Township*, 42 F.Supp.2d 493, 508 (M.D.Pa.1999) (rejecting argument that a decision not based on substantial evidence violates substantive due process).

## III. Conclusion

The court finds that the ZHB's denial of Omnipoint's application was not supported by substantial evidence in violation of section 332(c)(7)(B)(iii) the TCA; therefore, it does not rule on the question of whether section

332(c)(7)(B)(i)(II) or Pennsylvania law has been violated as well. Omnipoint's claim for relief under section 1983 is denied.

An appropriate order follows.

**Appendix E**

United States Court of Appeals,
Third Circuit.

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Appellant in No. 99-1990,
v.
ZONING HEARING BOARD OF EASTTOWN
TOWNSHIP; Township of Easton, Appellants in
No. 99-1932.

Nos. 99-1990, 99-1932.

Argued Nov. 7, 2000.
Filed April 25, 2001.

John S. Halsted, Andrew D.H. Rau (Argued), Gawthrop, Greenwood & Halsted, West Chester, PA, and Paola T. Kaczynski (Argued), Holsten & Associates, Media, PA, Attorneys for Appellants/Cross Appellees.

James C. Dalton, Riley, Riper, Hollin & Colagreco, Paoli, PA, and Christopher H. Schubert (Argued), Riley, Riper, Hollin & Colagrego, Exton, PA, Attorneys for Appellee/Cross Appellant.

Before ROTH, RENDELL and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

The Zoning Hearing Board ("ZHB") of Easttown Township ("Township") appeals the District Court's order directing it to allow Omnipoint Communications Enterprises, L.P. ("Omnipoint") to erect a telecommunications tower at a designated site within the Township. The ZHB contends that the District Court erred in finding that the ZHB's decision denying Omnipoint's application was not supported by substantial evidence as required by the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 332(c)(7)(B)(iii). Omnipoint argues that the District Court was correct on that score and cross- appeals the District Court's decision denying it damages and attorneys' fees under the Civil Rights Act, 42 U.S.C. § 1983. We conclude that the District Court erred in its analysis of the relevant state law. Accordingly, we will reverse its order and remand for proceedings consistent with this opinion.

I.

Omnipoint, a wireless Personal Communications Service ("PCS") provider, entered into a lease with the Or Shalom Synagogue ("Synagogue"), located in Easttown Township, to erect and operate a communications tower on a portion of its property. The proposed white fibreglass tower was to be approximately 110 feet tall, with a diameter of 24 inches at its base and tapering to 16 inches at the top. Omnipoint planned to enclose the base of the tower in a 30-foot by 30-foot structure and surround it with an eight-foot tall chain-link fence topped with barbed wire. To reduce the aesthetic impact of the tower, Omnipoint suggested using it as a flagpole, though it conceded that the tower would be taller and wider than a normal flagpole.

Because the Synagogue property was located in a district zoned AA- residential and the Township's zoning ordinance imposed a height limitation of 35 feet in such

areas, Omnipoint submitted an application to the ZHB for a use variance in order to erect its tower. *See* 53 P.S. § 10910.2. In the alternative, Omnipoint also submitted a challenge to the validity of the ordinance under the Pennsylvania Constitution and the TCA. *See* 53 P.S. § 10916.1. Omnipoint alleged that the ordinance was invalid under the Pennsylvania Constitution because it excluded wireless facilities and under the TCA because it had the effect of prohibiting wireless service.

The ZHB held public hearings on three separate dates over the course of several months to discuss Omnipoint's application. At these hearings, Omnipoint contended that the tower was necessary to fill a "gap" in its service in the southern portion of the Township and offered the testimony of several expert witnesses in support of its application. The Township, on the other hand, called only one witness, its Manager, who testified that the challenged ordinance was not exclusionary because it had been interpreted to permit special exceptions for cellular facilities in certain areas of the Township, such as the B-business districts.[1] Numerous Township residents also attended the hearings and expressed their opposition to the siting of the tower, largely on the basis that it would be an eyesore in the residential community in which it was to be situated.

At the conclusion of the hearings, the ZHB denied Omnipoint's application, stating its decision orally at one of its meetings and issuing a 10 page statement of findings and conclusions on a later date. With regard to the use variance request, the ZHB found that local zoning law places a high burden on the applicant to demonstrate why a variance is

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[1] The ordinance has since been amended to explicitly permit personal wireless service facilities in selected areas of the Township.

necessary and that Omnipoint had failed to do so.[2] [FN2] With regard to the validity challenge under state law, the ZHB found that the ordinance had been interpreted "to allow cellular/PCS facilities in certain appropriate zoning districts" within the Township and that, in fact, there were "several cellular or PCS towers or sites operating within the Township borders" and in contiguous areas (A.30- 31). As a result, the ordinance could not be said to be exclusionary. The ZHB also observed that the Township's justification for the challenged ordinance--namely, "preservation of the residential nature of the AA residential districts"--falls "within the traditional purposes of zoning regulation, and enforcement of zoning regulations is not negated by the Telecommunications Act of 1996 or [by Pennsylvania law]" (A.26, 30). Finally, the ZHB rejected the challenge under the TCA, concluding that the ordinance did not effectively prohibit wireless service.

In the District Court, Omnipoint did not challenge the ZHB's conclusion that it had failed to justify a use variance.[3] It did, however, continue to argue that the ordinance was unconstitutional because it was exclusionary. Omnipoint further insisted that the ZHB's decision upholding the validity

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[2] Under Pennsylvania law, one seeking a use variance must show that the zoning restriction "inflicts unnecessary hardship on the applicant," and (1) that there are unique physical circumstances or conditions peculiar to the property that create the hardship, (2) that because of these circumstances or conditions, there is no possibility that the property can be developed in conformity with the zoning ordinance, (3) that the applicant did not create the unnecessary hardship, (4) that the variance, if granted, would not alter the essential character of the area, and (5) that the variance, if granted, would represent the least modification possible to the regulation at issue. 53 P.S. § 10910.2.

[3] It is undisputed that there are no "unique physical circumstances or conditions peculiar to the property [such that] there is no possibility [of] the property [being] developed in conformity with the zoning ordinance." 53 P.S. § 10910.2.

of the zoning ordinance was violative of the TCA because it was not supported by substantial evidence, 47 U.S.C. § 332(c)(7)(B)(iii), and because it had the effect of prohibiting wireless service. 47 U.S.C. § 332(c)(7)(B)(i)(II). Finally, Omnipoint sought damages and attorneys' fees under the Civil Rights Act, 42 U.S.C. § 1983.

The District Court granted summary judgment in favor of Omnipoint and ordered the ZHB to grant Omnipoint's application. It found that the ZHB's decision was "based solely on the negative aesthetic impact of the tower" and "did not make any findings that the tower would affect the health, safety, or general welfare of the Township in any manner other than that of aesthetics." *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 72 F.Supp.2d 512, 516 (E.D.Pa.1999). The Court further concluded as a matter of Pennsylvania law that aesthetic concerns alone were "not sufficient to uphold the validity of the ordinance." *Id.* Since the Court found there was no evidence other than of negative aesthetic impact to support the ordinance, it held that the ZHB's decision violated the substantial evidence requirement of the TCA.[4]

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[4] The Court also expressed the view that the "general concerns voiced by the Township residents" would not constitute "substantial evidence" under the TCA even if a restriction on land use could be supported by aesthetic considerations alone under Pennsylvania law. However, as we demonstrate in the text, *infra*, Op. at 105-106, the validity of the ordinance under the Pennsylvania Constitution is not an issue that turns on adjudicative facts that require substantial record support under the TCA. The Township's zoning ordinance limiting the district to residential uses and imposing a 35 foot height restriction represents a legislative judgment about land use planning. If there are legislative facts that the decision makers could have viewed as supporting their judgment, record evidence is not required under the TCA. *See APT Pittsburgh Ltd. v. Penn Township, Butler County*, 196 F.3d 469, 475 (3d Cir.1999). As we also point out, *infra*, Op. at 108-109, this is not a case like *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403 (3d

Having found the ordinance unconstitutional on this ground, the District Court deemed it unnecessary to address whether Omnipoint had shown the ordinance to be impermissibly exclusionary under Pennsylvania law or whether the ZHB's decision was in violation of subsection 332(c)(7)(B)(i)(II) of the TCA because it had the effect of prohibiting wireless services. *See id.* at 516-17. With regard to Omnipoint's civil rights claims based on the TCA violation, the Court found that the TCA's remedial scheme is "sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy." *Id.* at 517 (quoting *Omnipoint v. Newtown Township*, No. 98-5171, 1999 WL 269936, at *7-10 (E.D.Pa. Apr.29, 1999)). The Court also concluded that Omnipoint's claim for section 1983 relief under a substantive due process analysis failed because it found no evidence of an improper motive and because the ZHB's decision was neither arbitrary nor capricious. *Id.*

II.

Subsection 332(c)(7)(B)(iii) of the TCA requires that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." Substantial evidence is a legal term of art. It "does not mean a large or considerable amount of evidence, 'but rather such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). A court reviewing under the substantial evidence standard "is not to weigh the

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Cir.1999), where we were called upon to review a zoning board's "denial of an application for a special exception."

evidence contained in that record or substitute its own conclusions for those of the fact finder," but rather is to "determine whether there is substantial evidence in the record as a whole to support the challenged decision." *AT&T Wireless v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d Cir.1999).

The District Court in this case correctly observed that "[s]ection 332(c)(7)(B)(iii) is not intended to supplant the substantive standards to be applied under state or local law." *Easttown*, 72 F.Supp.2d at 515; *see also Omnipoint Corporation v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 408 (3d Cir.1999); *APT Pittsburgh Ltd. v. Penn Township, Butler County*, 196 F.3d 469, 475 (3d Cir.1999). Accordingly, the first step for the court in a case in which the provider of wireless services is relying on state or local law is to identify the relevant issues under that law. If those issues require findings of adjudicative fact, the local authority's resolution of those factual issues must be supported by substantial evidence. Otherwise, any conclusion based on those findings violates subsection 332(c)(7)(B)(iii) and cannot stand.

Thus, as we pointed out in Penn Township:

> [i]t ... seems apparent that subsection 332(c)(7)(B)(iii) is intended to provide procedural protections with respect to the determination of factual issues made by a state or local authority in the course of applying state and local zoning law.... By contrast, it also seems apparent that subsection 332(c)(7)(B)(iii) is not intended to apply to decisions that are not to be made solely on the basis of the factual record before the agency and that are not to be the subject of deferential substantial evidence review.

...

> A decision on the "exclusivity" of a zoning ordinance under the Pennsylvania Constitution is a legal issue that is not subject to deferential judicial review. *See Borough of Edgewood v. Lamanti's Pizzeria*, 124 Pa.Cmwlth. 325, 556 A.2d 22 (1989). While such decisions may involve some consideration of legislative facts, the evidence to be considered is not limited to the facts of the particular applicant's case and is not necessarily limited to the record compiled by the local authority.

*Id.* at 474-75.

As we have noted, Omnipoint did rely on state law before the ZHB. It insisted that the ordinance barring it from erecting its tower was invalid under the Pennsylvania Constitution because it excluded wireless service towers. The law applicable to this kind of claim is well settled. Zoning ordinances in Pennsylvania enjoy a presumption of constitutionality and validity, and the party challenging one bears the "heavy burden" of proving otherwise. *See Penn Township*, 196 F.3d at 475 (quoting *Benham v. Board of Supervisors of Middletown Township*, 22 Pa.Cmwlth. 245, 349 A.2d 484, 487 (1975)); *see also Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 335 (1975); *Beaver Gasoline Co. v. Zoning Hearing Board of the Borough of Osborne*, 445 Pa. 571, 285 A.2d 501, 503-04 (1971) ("the validity of a zoning ordinance is presumed and ... the burden of establishing its invalidity is upon the party who seeks to have it declared invalid").

In order to overcome this presumption of constitutionality, the challenger must demonstrate that "the ordinance

totally excludes an otherwise legitimate use." *Farrell v. Worcester Township Board of Supervisors*, 85 Pa.Cmwlth. 163, 481 A.2d 986, 989 (1984). "Unless the challenger demonstrates that the ordinance in question completely or effectively excludes a legitimate use, ... the challenger has failed to carry its burden...." *Ficco v. Board of Supervisors of Hempfield Township*, 677 A.2d 897, 899 (Pa.Cmwlth.1996) (citing *BAC, Inc. v. Board of Supervisors of Millcreek Township*, 534 Pa. 381, 633 A.2d 144 (1993)); *Overstreet v. Zoning Hearing Board of Schuylkill Township*, 152 Pa.Cmwlth. 90, 618 A.2d 1108 (1992). To prove total or effective exclusion of a permitted use, the challenger can show that the ordinance is either de jure or de facto exclusionary:

> De jure exclusion exists where an ordinance, on its face, totally bans a legitimate use. De facto exclusion exists where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality.

*Penn Township*, 196 F.3d at 475 (internal quotations and citations omitted).

If the challenger is able to establish that the ordinance excludes the use in question, the burden then shifts to the state or locality "to demonstrate that the zoning ordinance '[b]ears a substantial relationship to public health, safety, and welfare.'" *Id.* (quoting *Borough of Edgewood v. Lamanti's Pizzeria*, 124 Pa.Cmwlth. 325, 556 A.2d 22, 24 (1989)); 53 P.S. § 10916.1(a)(5)(i)-(v); *see also Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585, 587 (1985) ("Where the challenger proves a total prohibition of a legitimate use, the burden shifts to the municipality to establish that the prohibition promotes public health, safety, morals and general welfare.") (citing *Beaver*

*Gasoline*, 285 A.2d at 503); *Ellick v. Board of Supervisors*, 17 Pa.Cmwlth. 404, 333 A.2d 239, 243- 44 (1975).

The District Court did not apply these state authorities. As we have noted, it expressed no view with regard to the ZHB's conclusion that Omnipoint had failed to show that the ordinance was exclusionary. Rather, it held that the ordinance restricting the AA-residential district to residential and related uses and to structures no higher than 35 feet was unconstitutional because zoning "based solely on aesthetic reasons [is] not a legitimate exercise of a locality's power to protect the general welfare." *Easttown*, 72 F.Supp.2d at 515.

We hold that the District Court's conclusion is contrary to Pennsylvania law. Residential districts with 35 foot high restrictions are, of course, a common feature of virtually all municipal zoning ordinances. *See* 2 Anderson, *American Law of Zoning* (4th ed.1996) § 39.55 ("The most common provisions limit buildings in single family residential districts to ... a height not in excess of 35 feet."). While such reasonable height restrictions have been justified on grounds other than aesthetics, *see id.*, we are confident that the Supreme Court of Pennsylvania would sustain them as a reasonable means of maintaining the residential character of the neighborhood. Pennsylvania courts have repeatedly held that aesthetic considerations promote the general welfare and thus are sufficient to justify the exercise of a locality's police power to establish zoning ordinances. *See e.g. Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395, 399 (1970) ("Certainly, [a municipality] may protect its attractive character by requiring apartments to be built in accordance with (reasonable) setback, open space, height, and other light-and-air requirements...."); *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 141 A.2d 606, 612 (1958) ("If the legislature has the power to compel a property owner to submit to a forced sale for the purposes of creating an attractive community, it has the power to regulate his prop-

erty for such objectives."); *Board of Supervisors of Northampton Township v. Gentsch*, 51 Pa.Cmwlth. 455, 414 A.2d 1102, 1105 (1980) (stating that "a municipality can protect its attractive character by imposing reasonable height restrictions").[5]

In arriving at the conclusion that zoning decisions based on aesthetics are not a legitimate exercise of a locality's police power, the District Court erroneously relied on cases in which Pennsylvania courts have required "extraordinary justification" to overcome a presumption that restrictions on residential lot sizes or other attempts to "establish residential enclaves by excluding population growth" constitute exclusionary zoning and are unduly restrictive of property rights. *Surrick v. Zoning Board of Upper Providence Township*, 476 Pa. 182, 382 A.2d 105, 108 (1978). *See Kirk v. Zoning Hearing Board of Honey Brook*, 713 A.2d 1226, 1229 (Pa.Cmwlth.1998); *Berman v. Board of Commissioners, Township of Lower Merion*, 147 Pa.Cmwlth. 405, 608 A.2d 585 (1992). It is true that when such restrictions are at issue, Pennsylvania courts have held that they "may not be sustained solely on the basis of aesthetics alone." *Berman*, 608 A.2d at 590 (quoting *National Land Investment Co. v. Easttown Board of Adjustment*, 419 Pa. 504, 215 A.2d 597, 610 n. 29 (1965)). But this is not the type of ordinance at issue here, and thus the Court's reliance on these cases is misplaced.

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[5] We recognize that the issue we here resolve is not a federal TCA issue. As we pointed out in Penn Township, state constitutional law issues of this kind do not come within the scope of the "substantial evidence" provision of subsection 332(c)(7)(B)(iii). This means that our jurisdiction to resolve it and that of the District Court emanates from 28 U.S.C. § 1367(a) (conferring supplemental jurisdiction to entertain a state law claim forming part of the same case or controversy). *See Omnipoint v. Warrington Township*, 63 F.Supp.2d 658 (E.D.Pa.1999) (recognizing that a federal court may have discretion in some circumstances to decline to resolve a state claim raised in a similar context).

The District Court also erroneously relied upon our decision in *Pine Grove*, 181 F.3d 403, for the proposition that the aesthetic concerns expressed in this case about the proposed tower do not meet the evidentiary standard required by the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(iii). There, we held that "a few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence" to support the denial of a special exception. *Id.* at 409 (citing *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir.1999) (same showing not sufficient in the denial of a special permit)); 53 P.S. § 10912.1 (governing special exceptions). As we have stressed, a reviewing court in a case like this must first identify the issue framed by the state or local law. Here the issue, at least as perceived by the District Court, was whether the ordinance was constitutionally inferior because it did not serve the public health, safety, or welfare. Our decision in Pine Grove is simply not helpful in resolving that issue.[6]

The judgment of the District Court thus rests solely on an error of law, and we must reverse.

III.

As we have explained, the District Court found it unnecessary to rule on Omnipoint's claim that the ordinance

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[6] The District Court also cited *White Advertising Metro. Inc. v. Zoning Hearing Board of Susquehanna Township*, 70 Pa.Cmwlth. 308, 453 A.2d 29, 34-35 (1982) for the proposition that aesthetic considerations are not enough to justify a zoning ordinance, but its reliance on that case is misplaced as well. At issue in White was whether a local zoning authority could deny a conditional use permit, on the basis of aesthetics alone, to an applicant who otherwise had met the required "standards and criteria" for obtaining such a permit. In that situation, the court held that it is not appropriate for a zoning authority to "grant or deny permits ... solely by the discretionary exercise of its subjective aesthetic judgment." *Id.* at 35.

was impermissibly exclusionary under Pennsylvania law or its claim that the ordinance had the effect of prohibiting the provision of wireless services in violation of the TCA. Moreover, the record in this case was developed without the benefit of our decision in *Penn Township* which addressed similar challenges under the Pennsylvania Constitution and the TCA and articulated the legal principles that must control here. Under these circumstances, we deem it prudent to remand this matter to the District Court to give the parties an opportunity to supplement the record and to secure the informed judgment of the District Court.

In *Penn Township*, as here, a wireless service provider claimed that the challenged ordinance was exclusionary because a tower in the area of the township in which towers were permitted would not allow it adequately to fill an alleged gap in its service in another portion of the township. We there held:

> Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township. To be exclusionary, the ordinance must effectively foreclose not only APT's use, but all use. Yet, APT provided no evidence to the ZHB that other providers could not use any of the 600 acres of M District land to build a tower that would functionally meet their systems' needs.

*Penn Township*, 196 F.3d at 477.

In this case, Omnipoint does not contest the ZHB's finding that other service providers have existing towers within the Township and in contiguous areas that provide

service within its borders. While there is some evidence concerning the service of those providers, it is safe to say that the record would be more fully developed had the parties had the benefit of the teachings of *Penn Township*.

The same is true with respect to the TCA issue. In *Penn Township* we established a two-prong test to determine if the decision of a local zoning authority has "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). It requires that the service provider first "show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480. If this burden is met, the provider must still prove "that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.* A record developed with this test in mind might well differ materially from the record currently before us, particularly as it relates to the second prong of the test.

IV.

Omnipoint's remaining claims are based on the Civil Rights Act. To the extent Omnipoint claims that the ZHB, acting under color of state law, violated its rights under the TCA, the issues raised need not be addressed until such a violation has been established. However, to the extent Omnipoint claims that the ZHB, acting under color of state law, violated its right to substantive due process, summary judgment was properly entered against Omnipoint. The summary judgment record reflects only a bona fide disagreement concerning land use planning issues. It will not support a conclusion that the ZHB has acted arbitrarily or capriciously. *See e.g. Pace Resources, Inc. v. Shrewsbury T.P.*, 808 F.2d 1023 (3d Cir.1987).

## V.

The judgment of the District Court will be reversed and this matter will be remanded to the District Court for further proceedings consistent with this opinion.

**Appendix F**

United States Court of Appeals,
For the Third Circuit.

No. 02-2194

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Appellant
v.
ZONING HEARING BOARD
OF EASTTOWN TOWNSHIP;

SUR PETITION FOR REHEARING
EN BANC

Before: Scirica, Chief Judge, Nygaard, Alito, Roth, McKee, Rentell, Ambro, Fuentes, Smith, Chertoff, Circuit Judges

The petition for rehearing filed by Amici Curiae AT&T Wireless Services, Inc. And Cellco Partnership in support of Petition for Rehearing filed by Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

**IT IS SO ORDERED.**

By the Court,

/s/ Theodore A. McKee
Hon. Theodore A. McKee
Circuit Judge

DATED: August 4, 2003

## Appendix G

47 U.S.C. § 332

TITLE 47.
TELEGRAPHS, TELEPHONES, AND
RADIOTELEGRAPHS

CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER III--SPECIAL PROVISIONS RELATING
TO RADIO

PART I--GENERAL PROVISIONS

§ 332. Mobile services

**(a) Factors which Commission must consider**

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

**(b) Advisory coordinating committees**

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

**(c) Regulatory treatment of mobile services**

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission

may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or un easonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of

providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission

determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under

subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any

provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

> (A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
>
> (B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.
>
> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to

be in the public interest to apply such requirements to such services.

**(d) Definitions**

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

(5)

No. 03-666

Supreme Court, U.S
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# In The Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

*Petitioner,*

vs.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Do the facts or the law of the case below implicate a so-called "one provider rule" interpreting Section 704(a) of the Telecommunication Act, 47 U.S.C. § 332(c)(7)(B)(i)(II)?

Suggested Answer: No.

Do the facts or law of the case below implicate a clear conflict with the decisions of another United States Court of Appeals?

Suggested Answer: No.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF AUTHORITIES ..... iii

REASONS TO DENY THE PETITION ..... 1

I. THE QUESTION PRESENTED BY THE PETITIONER DOES NOT RELATE TO THE LAW OR FACTS OF THE CASE ..... 1

II. THE DECISION OF THE THIRD CIRCUIT BELOW FALLS SQUARELY WITHIN THE INTENT OF THE TELECOMMUNICATIONS ACT ..... 6

III. PETITIONER'S ASSERTION OF A SPLIT AS TO THE FEDERAL CIRCUITS IS NOT WORTHY OF REVIEW GIVEN THE PETITIONER'S ERRONEOUS "ONE PROVIDER RULE" PREMISE ..... 8

CONCLUSION ..... 8

# TABLE OF AUTHORITIES

Page

CASES

*APT Pittsburgh, Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999) ..... 4, 5

*Nextel West Corporation v. Unity Township*, 282 F.3d 257 (3rd Cir. 2002) ..... 5

STATUTES

47 U.S.C. § 332(c)(7)(B)(i)(I) ..... 7

47 U.S.C. § 332(c)(7)(B)(i)(II) ..... 1, 2

OTHER AUTHORITY

H.R. Conf. Rep. 104-458, reprinted in 1996 U.S.C.C.A.N. Vol. 4, 124 ..... 6, 7

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## REASONS TO DENY THE PETITION

The question presented by the Petitioner before this Honorable Court is whether a so-called "one provider rule" is a proper test in implementing the Telecommunications Act of 1996 ("TCA"), particularly as to the TCA's mandate that state and local zoning decisions may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). However, an examination of both the Third Circuit Court of Appeals decision in this case, as well as the facts below, indicate that no such "one provider rule" is at issue.

The Petitioner's "one provider rule" theory is the gravamen of its Petition, and as this argument has no foundation in the law or facts of the case, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

## I.

## THE QUESTION PRESENTED BY THE PETITIONER DOES NOT RELATE TO THE LAW OR FACTS OF THE CASE

The case below has taken a lengthy path through both trial and appellate proceedings, but the current Petition springs from a two-day trial before United States Magistrate Judge Jacob Hart. Pet., App. C at 53a-73a. In light of the Petitioner's attempt to place a one hundred ten (110) foot telecommunications tower in a residentially zoned area within Easttown Township, and the Easttown Township Zoning Hearing Board's denial thereof, Judge Hart had been called upon to hear facts concerning, *inter alia*,

the Petitioner's argument that Easttown had improperly prohibited wireless services. He found in favor of Easttown.

The determination by Magistrate Judge Hart involved the "anti-prohibition" prong of the TCA at 47 U.S.C. § 332(c)(7)(B)(i)(II) which provides:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof –
>
> . . .
>
> (II) Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Magistrate Hart carefully analyzed the Petitioner's technical evidence concerning its claim that a significant gap in service existed along Route 252, a local road which runs through the residential district.[1] The Petitioner's own evidence showed that eight (8) service providers, including the Petitioner, provided wireless service in the area. Judge Hart found that the seven (7) service providers, other than

[1] The Petitioner's characterization of Route 252 as "a major commuter highway," Pet. at 4, does not find support in the record. The Petitioner's own technical witness, Engineer Paul Dugan, challenged his own attorney's characterization of Route 252 "as being a major road." 3d Cir. App. at 174 (3d Cir. App. referring to the Petitioner's appendix filed with the Third Circuit Court of Appeals). Mr. Dugan stated only that "I believe 252 is major relative to its surrounding area in southern Easttown Township." *Id.* This local road was described by Easttown Township's Manager as flanked or surrounded by "very countrified," or "residential" areas. 3d Cir. App. at 371.

the Petitioner (Omnipoint), had a combined service level which matched all of the Petitioner's own testified-to standards for determining adequate service levels in an area. Magistrate Judge Hart summarized the analysis of the Petitioner's engineer, Paul Dugan, as follows:

> Mr. Dugan testified that each phone made approximately eighty phone calls during his test drive for a total of 640 calls total. (N.T. 1/31/02, 89). He then drew our attention to the number of dropped calls, and instances where there was no service. (FN 5)
>
> Reviewing the charts for the seven service providers, other than Omnipoint, we see only 10 dropped calls and one instance of no service. (Plaintiff's Exhibit 2, A E). Therefore, of the 560 calls made utilizing the other providers' services, only 11 or 1.96% experienced service problems. Omnipoint, on the other hand, had 11 dropped calls and 13 instances of no service. (Plaintiff's Exhibit 2, F). Using Mr. Dugan's figure of 80 calls attempted, Omnipoint had service related problems 30% of the time.
>
> > FN 5. Mr. Dugan explained that "fast busy" and "reorder" are functions of capacity, in essence, too many people using their phones at the same time. (N.T. 1/31/02, 101-02). "Connect time out" occurs for any number of reasons when the cellphone cannot connect to the national network properly. (N.T. 1/31/02, 101).
>
> As a result, rather than establishing a significant gap overall, Mr. Dugan's analysis provided that only one provider, Omnipoint, was incapable of providing reliable services to its customers. Such

> a showing does not satisfy the *Penn Township* burden. "[I]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *Penn Township*, 196 F.3d at 480. Having failed to establish a significant gap, Omnipoint has failed to prove the ZHB's denial of the variance had the effect of prohibiting the provision of wireless service.

Pet. App. C at 60a-61a.

The above passage from Magistrate Judge Hart's decision references the Third Circuit case of *APT Pittsburgh, Ltd. v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999), which held that the proper test as to prohibition under the TCA is whether (1) there is a significant service gap as to all providers, not just the applicant, and (2) whether the least intrusive means is proposed to fill such a gap.

As the Petitioner's own technical expert convincingly established the fact that seven (7) other service providers were able to provide reliable service in the area, thus destroying Petitioner's allegation of a significant service gap, Judge Hart found for Easttown, and the tower was not constructed. Now, the Petitioner has re-framed its legal argument to minimize these facts, and thus the so-called "one provider rule" argument was born.

On appeal to the Third Circuit Court of Appeals, the Petitioner argued that *APT Pittsburgh, Ltd. v. Penn Township*, *supra*, established a test in which a municipality could prohibit all other wireless service providers once one provider was in. In the Third Circuit's initial decision on appeal from the decision of Magistrate Judge Hart, Circuit Judge Rosenn reversed in a 2 to 1 ruling, apparently

concerned that the *Penn Township* case "would seem to prohibit any provider from serving an area already served by another provider." Pet., App. B at 41a. However, upon Easttown's Petition for Rehearing, Circuit Judges Sloviter and McKee recognized properly that the facts of the case had nothing to do with Judge Rosenn's speculative concern, and vacated the early decision.

As Judge Sloviter noted in referring to the *Penn Township* case, as well as *Nextel West Corporation v. Unity Township*, 282 F.3d 257 (3rd Cir. 2002), "We do not read those decisions to authorize the township zoning boards to deny any application once the area is already served by another provider, which is Omnipoint's restatement of the holding. Instead, we merely hold that a fact finder determining the existence of a significant gap should examine whether other providers already serve the area. The fact that one applicant may have coverage problems is not determinative of whether there is a significant gap." Pet., App. A at 22a.

A straightforward comparison of the Petitioner's argument before this Honorable Court, and the words of Circuit Judge Sloviter, show beyond cavil that the Petitioner's "one provider" argument has no relation to the Third Circuit ruling. Compare the Petitioner's claim at page 10 of its Petition:

> The Third Circuit has adopted a "one provider rule" whereby a local or state government decision denying a permit for a wireless facility can never have the effect of prohibiting the provision of personal wireless services if at least one competing provider offers wireless service in the relative geographical area.

with the following plain language of Judge Sloviter's opinion:

> Omnipoint argues that a holding will promote monopolization and conflict with the pro-competitive objectives of the TCA (adopting Judge Rosenn's view expressed in the original panel opinion). **But nothing we say here suggests that the zoning board can deny all applications after the first.**

Pet. at 10, Pet., App. A at 21a (emphasis added).

In short, Petitioner has willfully ignored the Third Circuit's majority opinion in an attempt to fashion a certiorari-friendly rule that simply does not exist. Petitioner's argument over the "one provider" theory cannot stand up to Circuit Judge Sloviter's recognition that "[t]he area at issue in this case is already served by seven other providers." *Id.* at 22a.

## II.

## THE DECISION OF THE THIRD CIRCUIT BELOW FALLS SQUARELY WITHIN THE INTENT OF THE TELECOMMUNICATIONS ACT

While the Petitioner cites legislative history of the TCA for the broad proposition that the Act was intended solely to remove barriers to entry by telecommunications providers, *see, e.g.,* Pet. at 21 and 22, these broad assertions give way in the United States House of Representatives Conference Report No. 104-458 to specific language that shows an intent to preserve traditional local governmental zoning and land use powers. For instance, the House Conference report on the Act states:

> [T]he conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

H.R. Conf. Rep. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at Vol. 4, 222 (interpreting the "anti-discrimination" provisions of the Act). Indeed, as recognized by both Third Circuit panels, the presence of two communication towers in Easttown's business district at the time of the Petitioner's application defeats any argument concerning the discrimination prong of the TCA at 47 U.S.C. § 332(c)(7)(B)(i)(I). Pet., App. A at 12a-13a; App. B at 49a.

Similarly, the legislative history of the Act indicates that decisions as to "prohibition" are not all or nothing propositions:

> It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed **and that decisions be made on a case-by-case basis.**

H.R. Conf. Rep. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at Vol. 4, 222 (emphasis added).

The fact-finders below engaged in a careful analysis of the Petitioner's case well within the parameters of the TCA. The Petitioner is entitled to nothing more, even if it is dissatisfied with the result.

## III.

## PETITIONER'S ASSERTION OF A SPLIT AS TO THE FEDERAL CIRCUITS IS NOT WORTHY OF REVIEW GIVEN THE PETITIONER'S ERRONEOUS "ONE PROVIDER RULE" PREMISE

The Petitioner's erroneous "one provider rule" premise provides its basis for asserting a split with another United States Court of Appeals. As the "one provider" premise is without foundation in the first instance, the Petitioner's discussion of this so-called "one provider rule" fails to show an important, much less any, conflict among the circuits. Further elaboration by the Respondent is therefore unnecessary.

## CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

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# In The Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
*Petitioner*

*v.*

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,
*Respondent*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT | 1 |
| A. Respondent Wrongly Asserts that the Third Circuit's "One Provider" Rule Does Not Exist | 1 |
| B. The Third Circuit has Repeatedly Applied the One Provider Rule, Most Recently in the Present Majority Panel Decision | 2 |
| C. The Third Circuit's One Provider Rule Has Been the Subject of Much Debate and Analysis | 6 |
| CONCLUSION | 8 |

## TABLE OF AUTHORITIES

Page

CASES

*APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999) ..... 2

*MetroPCS, Inc. v. City & County of San Francisco*, 259 F.Supp.2d 1004 (N.D.Cal. 2003) ..... 7

*Nextel West Corp. v. Unity Township*, 282 F.3d 257 (3d Cir. 2002) ..... 2, 3, 5

*Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3d Cir., June 4, 2003) ..... 4

*Second Generation Properties L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002) ..... 7

STATUTES

47 U.S.C. § 332(c) ..... 5

LAW REVIEWS

Stephanie Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002) ..... 7

## STATEMENT

### A. Respondent Wrongly Asserts that the Third Circuit's "One Provider" Rule Does Not Exist.

The Respondent opposes Omnipoint's Petition for a Writ of Certiorari based on the assertion that the Third Circuit's "one provider" rule "does not exist." Brief in Opposition to Petition for a Writ of Certiorari ("Brief") at 6. This assertion is directly contradicted by the panel decision below, which was entirely based on the one provider rule. In fact, the panel discussed the parameters of that rule in great detail. (App. 15a-23a) (discussing the Third Circuit's *Penn Township* ruling and reaffirming the one provider rule as first articulated in *Penn Township*). This discussion was central both to the original panel decision and to the revised decision on rehearing. Furthermore, the one provider rule – and the problems created by that rule – has been critically discussed by, *inter alia*: (1) the dissenting judge in this case, (2) other federal circuit courts, (3) federal district courts, (4) legal commentators, and (5) industry participants. *See, e.g.*, Brief of Amicus Curiae Nextel Communications, Inc. and Brief of Amici Curiae AT&T Wireless Services, Inc. and Verizon Wireless In Support of Petition for a Writ of Certiorari (collectively "Briefs of Amici Curiae") (discussing the one provider rule's negative effect on competition and growth in the wireless telecommunications industry).

The "'one provider rule' argument" was not "born" in the present Petition, as Respondent suggests. Brief at 4. Rather, the one provider rule is a well-established but controversial element of the Third Circuit's interpretation of the federal Telecommunications Act ("TCA"). The rule has been widely recognized as creating an important and unresolved conflict of law between the circuits.

### B. The Third Circuit has Repeatedly Applied the One Provider Rule, Most Recently in the Present Majority Panel Decision.

As discussed in the Petition for a Writ of Certiorari, the Third Circuit imposes a "one provider" standard on prohibition of service claims brought under the TCA. The rule was first articulated in *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), and the Third Circuit has since reaffirmed the *Penn Township* holding. *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir. 2002). This rule requires a prohibition of service petitioner such as Omnipoint to submit evidence that "the area the new facility will serve is not already served by another provider." (App. 17a, 21a). "[T]his prong focuses on whether any provider is covering the gap, instead of whether the gap exists" in the petitioner's own service. *Nextel West Corp.*, 282 F.3d at 265. Under this restrictive interpretation, prohibition of service claims are effectively barred wherever a single competing provider already serves a given geographical area. (App. 31a) (dissenting opinion) (disagreeing with the majority holding "that coverage by any provider precludes all statutory prohibition of service claims.")

In opposing the present Petition, the Respondent denies that *Penn Township's* one provider rule exists or that it formed the basis for the panel's majority decision. Brief at 4-6. Yet this is directly contradicted by the decision itself. The majority opinion cited approvingly to both *Penn Township* and *Nextel West Corp.* in reaffirming the one provider rule. (App. 20a-23a). Furthermore, the majority stated explicitly that it was rejecting the appeal because Omnipoint could not show that "the area the new facility will serve is not already served by another provider." (App.

20a-21a) (quoting *Nextel West Corp.*, 282 F.3d at 265). The majority referred repeatedly to evidence that other wireless carriers already provided service to the affected area. (App. 20a-22a). Based on this evidence, the panel concluded: "the Magistrate Judge properly applied *Penn Township*[.]" (App. 22a).

Moreover, the unusual panel proceedings below reflected an explicit debate among the panel members as to the viability of the one provider standard. In the original and unanimous panel decision, Judge Rosenn described as "puzzling" the statement from *Penn Township* that a prohibition of service petitioner such as Omnipoint must prove that "the area the new facility will serve is not already served by another provider." (App. 41a). The panel held that this rule "would seem to prohibit any provider from serving an area already served by another provider," and that it would "promote monopolization and thus conflict with the pro-competitive objectives of the TCA." *Id.* Accordingly, the original decision held that in determining whether there was a "significant gap in service" actionable under the TCA, the reviewing Court must consider the gap in the petitioner's own wireless communications system. (App. 41a-42a).[1]

The Township filed a request for reconsideration of this decision, arguing that panel had usurped *Penn Township's* requirement that "an applicant wireless provider will have to show that other, non-applicant providers do

[1] In a concurring opinion, Judge Sloviter indicated that she had "reservations" that this decision "may not be consistent with our holding in *Penn Township*." (App. 50a-51a).

not already provide adequate service in the area in question." Petition of Appellee for Rehearing En Banc at 4, *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3d Cir., June 4, 2003). "If the area in question is already being served adequately by other providers, there is no gap for the purposes of the TCA." *Id.* On rehearing, two of the three panel members agreed and therefore reversed course. The second panel opinion held that under *Penn Township*, Omnipoint was required to prove that a service gap existed for all other wireless providers, and that evidence of Omnipoint's own gap in service was irrelevant to that determination.[2] (App. 21a). Judge Rosenn wrote in dissent to reiterate that this holding would threaten "Congress' goal of promoting the rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." (App. 32a).

Contrary to Respondent's current argument, therefore, *Penn Township's* one provider rule was central to the holding below and to the panel's decision on rehearing to revise its original ruling. In fact, in seeking rehearing the Respondent relied on the *Penn Township* standard that it now argues does not exist.

---

[2] Respondent's brief ignores this important aspect of the decision below. The requirement that a reviewing court ignore evidence of the petitioner's service gap clearly reflects the anti-competitive effect of the one provider standard. (App. 21a) (the panel majority held that the service gap must be measured without reference to "data from the applicant provider.") A TCA petitioner such as Omnipoint would only bring a prohibition of service claim because it suffers from a significant gap in its own wireless services coverage. Yet under the majority panel decision that gap in coverage is irrelevant in determining whether petitioner's prohibition of service claim is valid.

Respondent also argues that because multiple providers already serve the disputed area, rather than a single provider, the majority decision does not implicate the one provider rule. Brief at 2-6. This argument ignores two important aspects of the one provider standard. First, it moves the focus of the TCA prohibition of service test from the existing quality of service of the provider applicant to the existing quality of service of the competing carriers that already serve the disputed area. Second, pursuant to *Penn Township* and *Nextel West Corp.*, application of the rule does not depend on the relative number of additional providers already serving Easttown Township. Instead, the presence of even a single competing provider is sufficient to defeat Omnipoint's prohibition of service claim. In summary, the anticompetitive effects of the rule are the same regardless of how many providers already serve the area. Every future entrant to this wireless communications market will be permanently barred from relief under the prohibition of service prong of the TCA.

In arguing that the one provider rule does not exist, the Respondent also relies on a statement from the majority rehearing opinion that is taken out of context. As quoted in Respondent's brief, the panel majority stated: "But nothing we say here suggests that the zoning board can deny all applications after the first." Brief at 5-6 (citing App. 21a). Respondent fails to point out that the panel here was referring to an alternative form of relief under the TCA, the "anti-discrimination" provision of 47 U.S.C. § 332(c). (App.21a-22a). The panel's brief discussion of that alternate provision did not amend the one provider standard as applied to prohibition of service claims. Furthermore, as discussed in the Petition the unreasonable discrimination provision has been strictly construed

by the Third Circuit and by other courts. It therefore does not correct for the anti-competitive effects of the one provider rule. *See* Omnipoint's Petition for a Writ of Certiorari at 23-25 (discussing the strict interpretation imposed on anti-discrimination claims under the TCA and demonstrating that this provision does not temper the impacts of the Third Circuit's one provider rule).

### C. The Third Circuit's One Provider Rule Has Been the Subject of Much Debate and Analysis.

Contrary to Respondent's assertion that Omnipoint invented the one provider standard "in an attempt to fashion a certiorari-friendly rule that simply does not exist," Brief at 6, the rule has been the subject of much debate, including in the present case. As noted above, discussion of the one provider rule was central to the proceedings below. The final majority decision was expressly based on the application of that rule. (App. 20a) (citing *Penn Township* and finding that Omnipoint had failed to prove the existence of a significant gap in service). In fact, in his superceded panel opinion and in his dissent from the ruling on rehearing Judge Rosenn discusses the negative consequences of the one provider standard. He confirms the Petitioner's concern that it will stifle competition and suppress the deployment of advanced telecommunications networks. "The majority approach today threatens Congress' goal of promoting the rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." (App. 32a) "The . . . opinion will effectively impede the development of new digital technologies that have more limited range but superior capabilities." (App. 32a).

The Court of Appeals for the First Circuit has evaluated and explicitly rejected the Third Circuit's one provider approach in favor of a more flexible standard. *Second Generation Properties L.P. v. Town of Pelham*, 313 F.3d 620, 632-34 (1st Cir. 2002) (rejecting the third Circuit rule because "the result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier."). The *Second Generation* ruling creates a clear split with the Third Circuit. Likewise, federal district courts have evaluated and rejected the Third Circuit rule. *See, e.g., MetroPCS, Inc. v. City & County of San Francisco*, 259 F.Supp.2d 1004, 1013 (N.D.Cal. 2003) (evaluating the split between the First and Third Circuits and adopting the First Circuit's more flexible standard). The "one provider" problem has also been recognized by legal commentators (*see, e.g.*, Stephanie Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002)), and by other industry participants (*see* Briefs of Amici Curiae) (discussing the practical anti-competitive effects of the one provider rule and its stifling effect on the deployment of advanced telecommunications networks).

Given the widespread recognition and discussion of the Third Circuit's one provider rule, it is surprising that the Respondent opposes the present Petition by arguing that the rule does not exist. This assertion is demonstrably untrue. The rule exists, it creates a clear circuit split, and it represents a recurring issue of extraordinary importance that requires resolution by this Court.

## CONCLUSION

The Petitioner respectfully renews its request that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

*Petitioner*

v.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP, PENNSYLVANIA

*Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

# BRIEF OF AMICUS CURIAE NEXTEL COMMUNICATIONS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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22 pp

## TABLE OF CONTENTS

Table of Contents ..... i

Table of Authorities ..... ii

Interest of Amicus Curiae ..... 1

Summary of the Argument ..... 2

Argument ..... 4

I. In Order To Accelerate Deployment Of Wireless Networks The TCA Imposes Procedural And Substantive Limits Upon The Ability Of Local Governments To Regulate Wireless Telecommunication Facilities ..... 4

II. Despite The "Effective Prohibition" Clause Local Regulation Continues To Impede Deployment Of Wireless Services ..... 6

III. There Is A Split Among The Circuits Regarding The Application Of The "Effective Prohibition" Clause In Cases Involving Denials Of Proposals To Build Wireless Facilities ..... 9

IV. The Third Circuit's Approach Impermissibly Tips The Balance Established By The "Effective Prohibition" Clause In Favor Of The Municipalities ..... 15

Conclusion ..... 17

## TABLE OF AUTHORITIES

**Cases**

BellSouth Mobility, Inc. v. Gwinnett County, 944 F.Supp. 923, 927 (N.D. Ga. 1996) ..... 4

Brehmer v. Town of Wellfleet, 238 F.3d 117 (1st Cir. 2001) ..... 5

Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999) ..... 12, 13

National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14 (1st Cir. 2002) ..... 6

Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159 (D.Mass. 2003) ..... 7

Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396 (D.Mass. 2002) ..... 7

Omnipoint Comm. Enter. v. Zoning Hearing Board of Easttown Township, 331 F.3d 386, 398-99 (3rd Cir. 2003) ..... 15, 16

Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108 (D.Mass. 2000) .. 7

Omnipoint Holdings v. Town of Westford, 206 F.Supp.2d 166, 172 (D.Mass. 2002) ..... 11

Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002) ..... 13, 14, 15

Sprint Spectrum v. Willoth, 176 F.3d 630 (2nd Cir. 1999) .....11

TeleCorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257 (D.Mass. 2000).....5

Town of Amherst v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999).....5, 10, 11

USCOC of Virginia RSA # 3 v. Montgomery County Board of Supervisors, 343 F.3d 262, 268 (4th Cir. 2001) .....10, 14

Voicestream Minneapolis Incorporated v. St. Croix County, 342 F.3d 818 (7th Cir. 2003).....14

**Statutes**

47 U.S.C. § 332 (c)(7)(B) .....2, 5, 6, 16

47 U.S.C. § 615.....5

47 U.S.C. §§ 332 (c)(7)(C)(i) .....6

Wireless Communications and Safety Act of 1999, Pub. L. 106-81, 113 Stat. 1286, 1287 § 2(a)(6) (1999) .....5

**Other Authorities**

Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey).....4

Letter from Sen. Charles E. Schumer to Michael K. Powell, Chairman of the Federal Communications Commission, available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01332.html (November 24, 2002) .....15

Press Release of Rep. Anthony D. Weiner regarding Cell Phone 9-1-1 Study, available at http://www.house.gov/apps/list/press/ny09_weiner/0202126cell.html (January 26, 2003).....8, 15

**Rules**

Supreme Court Rule 37.2 .....1

Supreme Court Rule 37.6 .....1

## INTEREST OF AMICUS CURIAE

Amicus Nextel Communications, Inc. is publicly traded on NASDAQ. Together with its publicly traded affiliate, Nextel Partners, and their respective operating subsidiaries (all of which are hereinafter collectively referred to as "Nextel"), [1] Nextel is the fifth largest provider of wireless telephone services in the United States. As of September 2003, Nextel had over 12,000,000 customers and it continues to add customers at the rate of more than 150,000 per month. [2]

As of the end of 2002, Nextel's wireless network consisted of approximately 16,300 antenna sites nationwide, serving areas where nearly 250,000,000 of our Nation's citizens reside. Nextel has invested billions of dollars in this infrastructure.

In order to continue to enhance and maintain its wireless network, Nextel -- like the Petitioner and like every other provider of wireless telephone services -- routinely must seek authorization from local governments to construct antenna facilities. Primarily because of the visual impact of such facilities, providers often face difficulty in obtaining such

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[1] Pursuant to Supreme Court Rule 37.2 (a), Nextel states that the parties to this appeal have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 37.6, Nextel states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Nextel made any monetary contribution to the preparation or submission of this brief.

[2] The statistics cited in this and the following paragraph are set forth in public filings made by Nextel with the United States Securities and Exchange Commission and other publicly-available disclosures.

permission. They thus require the protection of federal law, which is provided by Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332 (c)(7)(B) (hereinafter the "TCA"). The TCA strikes a balance between the legitimate interests of local governments and the national policy which favors the deployment of wireless telephone services and other advanced telecommunications technologies. This balance has been upset by the Third Circuit's 2-to-1 decision in the case at bar, which has interpreted the "effective prohibition" clause in the TCA in a manner that is contrary to the interpretation of other circuit courts. If allowed to stand, the Third Circuit rule would allow local governments to regulate wireless telecommunications providers and to restrict their ability to provide service in a manner not intended by Congress. Nextel respectfully submits that certiorari review by this Honorable Court is needed to restore a proper balance and to create uniformity in this important area of federal law.

## SUMMARY OF THE ARGUMENT

The TCA was enacted in 1996 to accelerate private sector deployment of advanced telecommunications technologies, including wireless services, in a deregulated and pro-competitive environment. Congress again sought to foster this aim in 1999 when it passed the Wireless Communications and Safety Act of 1999, noting the importance of ubiquitous and seamless wireless networks in providing immediate access to safety and emergency services.

In passing these laws, Congress sought to strike a deliberate compromise between two competing aims, namely, the preservation of local zoning powers to the extent necessary to protect legitimate local interests, on the one hand, and the ability of wireless providers to deploy the facilities needed to create ubiquitous and seamless networks, on the other. Central to the establishment of this balance is the "effective prohibition" clause of the TCA, which proscribes local regulations that have the effect of prohibiting either wireless services or the facilities necessary to provide them.

The five circuits which thus far have analyzed the "effective prohibition" clause have not adopted a uniform interpretation of the statute. This has impeded the ability of providers to obtain permission from local governments to deploy wireless facilities. To make matters worse, despite the clearly-expressed intent of Congress, the Third Circuit has adopted a rule which allows local governments to decide which carriers they will allow to provide service within their municipalities. This will result in what the First Circuit has described as a "crazy patchwork quilt" of network coverage, rather than the seamless networks which Congress envisioned and which wireless telephone users have the right to expect.

The case at bar presents this Honorable Court with an opportunity to adopt a uniform nationwide interpretation of an important federal statute in a manner that Congress intended.

## ARGUMENT

### I. In Order To Accelerate Deployment Of Wireless Networks The TCA Imposes Procedural And Substantive Limits Upon The Ability Of Local Governments To Regulate Wireless Telecommunication Facilities

As Petitioner correctly explains, Congress passed the TCA in order to accelerate private sector deployment of advanced telecommunication technologies and to make wireless telephone services available to all Americans. Petition for Certiorari at 2. The statute has been described as "'expansive legislation designed primarily to increase competition in the telecommunications industry," Sprint Spectrum L.P. v. Town of Easton, 982 F.Supp. 47, 49 (D.Mass. 1997) (quoting BellSouth Mobility, Inc. v. Gwinnett County, 944 F.Supp. 923, 927 (N.D. Ga. 1996), and "to take 'down the barriers'" faced by parties entering the telecommunications market, Town of Easton, 982 F.Supp. at 50 (quoting Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey)).

The national policy of accelerating deployment of wireless technologies was reiterated in the Wireless Communications and Safety Act of 1999,[3] which contains a finding that "the construction and operation of seamless, ubiquitous, and reliable wireless

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[3] The Wireless Communications and Safety Act of 1999 was intended to facilitate the deployment of enhanced-911 services, a new technology which merges Global Positioning Satellite technology with wireless telephone technology in order to allow emergency services to pinpoint the location from which an emergency call has been made.

telecommunications systems promote public safety and provide immediate and critical communications links among members of the public [and] [emergency service providers]." Wireless Communications and Safety Act of 1999, Pub. L. 106-81, 113 Stat. 1286, 1287 § 2(a)(6) (1999). See, also, 47 U.S.C. § 615.

To effectuate this national policy, "'the TCA significantly limits the ability of state and local authority to apply zoning regulations to wireless telecommunications.'" TeleCorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 259 (D.Mass. 2000) (quoting Town of Easton, 982 F. Supp. at 49). Local zoning powers are preserved, but only to the extent that they do not conflict with the rights granted to the telecommunications industry under the TCA. Town of Easton, 982 F. Supp. at 50. Although the TCA does not supplant local land use authority with respect to the construction of wireless telecommunications facilities, it does impose both procedural and substantive limits upon the power of local governments to regulate the placement and construction of such facilities. Town of Amherst v. Omnipoint Communications Enter., Inc., 173 F.3d 9, 12 (1st Cir. 1999). Where local government regulation exceeds any of the limits imposed by the TCA, wireless carriers are entitled to expedited relief in the district courts, 47 U.S.C. § 332 (c)(7)(B)(v), and "the state law that might ordinarily control such disputes is preempted." Brehmer v. Town of Wellfleet, 238 F.3d 117, 121 (1st Cir. 2001).

The First Circuit has described the TCA as "an exercise in cooperative federalism [which] represents a dramatic shift in the nature of telecommunications regulation." National Tower v. Plainville Zoning

Board of Appeals, 297 F.3d 14, 19 (1st Cir. 2002). Central to this "cooperative federalism" is an application of the TCA which strikes the proper balance between the national policy in favor of accelerated deployment and the legitimate interests that local governments have in regulating the aesthetic impact of wireless facilities.

## II. Despite The "Effective Prohibition" Clause Local Regulation Continues To Impede Deployment Of Wireless Services

The Petition for Certiorari in this case presents an opportunity for this Honorable Court to ensure that the substantive limitation in the TCA which provides that local government regulation of wireless antenna facilities shall not "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332 (c)(7)(B)(i)(II),[4] is interpreted and applied in a manner consistent with Congressional intent. This provision has not yet prevented local land use authority from being yielded in a manner that is inconsistent with the Congressional purpose of encouraging the deployment of wireless networks.

Although it might be difficult in the abstract to determine what kinds of local policies might "have the effect of banning wireless services" or the facilities necessary to provide them, it cannot seriously be disputed that in the seven years since the TCA was

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[4] "Personal wireless services" as used in the TCA includes various types of telecommunications services including those services which are commonly referred to as cellular telephones. See 47 U.S.C. §§ 332 (c)(7)(C)(i), (d)(1).

enacted, wireless providers have faced significant difficulties in obtaining the local permission needed to deploy their facilities. Such difficulties are exemplified by various types of local government regulations described in numerous reported cases. For example, in Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108 (D.Mass. 2000), the court examined a regulatory scheme which "restrict[ed] the location of [wireless facilities to six parcels of land scattered throughout the town], place[d] significant restrictions upon the manner in which [wireless facilities] may be constructed [and imposed] substantial filing requirements for obtaining a special permit" needed to construct any wireless facility. 107 F.Supp.2d at 111.[5] As another example, Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396 (D.Mass. 2002), involved rejection of a proposal to mount an antenna facility on top of an existing 97-foot tall electric transmission tower which followed eight years of unsuccessful efforts by various wireless providers to bring their services to the town. And, in Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159 (D.Mass. 2003), the municipal regulation, "[w]hile seemingly innocuous on its face" resulted in "only four parcels of land [in the town being permissible for wireless deployment] none

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[5] Despite the district court's holding in October 2000 that the Lincoln regulatory scheme violated federal law, Lincoln has not substantially altered that scheme and continues to be a defendant in at least two district court actions filed by carriers seeking to deploy wireless antenna facilities in the town. See Cellco Partnership v. Town of Lincoln, No. 01-CV-10739-MLW (D.Mass.); Nextel Communications v. Town of Lincoln, 01-CV-10740-NG (D. Mass).

[of which actually were] available. . . ." 2003 WL 21497159, at *10. Similar examples can be found in many other reported (and unreported) decisions.

Continued reports of "dead spots" throughout the Nation provide further evidence that local governments have not recognized their obligations to allow wireless carriers a reasonable opportunity to deploy the facilities needed. As but one example, earlier this year Congressman Anthony Weiner (D-NY) reported the results of a study which concluded that in New York City alone, more than 500 "dead spots" exist for the six major carriers licensed to serve that municipality. See Press Release of Rep. Anthony D. Weiner regarding Cell Phone 9-1-1 Study, available at http://www.house.gov/apps/list/press/ny09_weiner/0202126cell.html (January 26, 2003). In large part because of these gaps in coverage, "[e]ach year in [New York City] an estimated 120,000 calls placed to 9-1-1 on cell phones don't go through." Id. Nationwide, the estimate is an astonishing 2,200,000 unsuccessful emergency calls annually. Id.

To be sure, not all coverage gaps can be attributed to overly-restrictive local regulation of wireless facilities. The conclusion is nevertheless inescapable that local government regulation remains a substantial impediment to the fulfillment of the national policy, as articulated by Congress, of developing ubiquitous and seamless wireless networks.

## III. There Is A Split Among The Circuits Regarding The Application Of The "Effective Prohibition" Clause In Cases Involving Denials Of Proposals To Build Wireless Facilities

In the seven years since the TCA became law, dozens of district courts decisions and several circuit court decisions have addressed the meaning of this "effective prohibition" clause. These cases have arisen in various settings, owing to the specifics of the local regulation at issue, the nature and location of the carrier's proposed facility, the availability of alternative siting locations and other factors. Unfortunately, the circuits have not been uniform in their interpretation of the clause, and this has only compounded the difficulties carriers face in seeking to convince often-skeptical local officials that a particular wireless facility should be allowed.

Cases involving moratoria or other outright bans of wireless facilities have not been difficult to decide. See, e.g., AT&T Wireless PCS Incorporated v. City Council of City of Virginia Beach, 155 F.3d 423, 428 (4th Cir. 1998) (citing four cases overturning local moratoria on zoning permits for wireless facilities). Inconsistent approaches among the circuits have arisen, however, where regulations which did not facially ban wireless facilities but which led to denial of specific proposals were alleged to be too restrictive.

Virginia Beach, 155 F.3d 423, was the earliest circuit court decision analyzing the "effective prohibition" clause. In that case, the Fourth Circuit held that the "effective prohibition" clause could not be violated by anything other than an outright ban

(although the court stated it dicta that it was prepared to recognize that "policies that do not explicitly ban . . . service but do, when applied . . ., guarantee the rejection of every application could . . . also violate [the TCA]") 155 F.3d at 429.[6]

Then, in Town of Amherst v. Omnipoint Communications Enter., 173 F.3d 9 (1st Cir. 1999), the First Circuit refused to "rule out the possibility that -- based on language or circumstances -- some individual decisions could be shown to reflect, or represent an effective prohibition on wireless services." Id. at 14. The court also made it plain that local governments bear at least some responsibility to create reasonable opportunities for deployment, holding that municipalities cannot "exhaust applicants by requiring successive applications without giving any clue of what will do the trick." Id. at 17. The court nevertheless held that in such cases the provider claiming an effective prohibition of wireless service must meet the "heavy" burden of demonstrating that (either on the face of the challenged regulation or under the circumstances surrounding its application by the municipality) "further reasonable efforts" to obtain

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[6] The Fourth Circuit has since made it clear that in the absence of an outright ban, a finding of a "guaranteed rejection" will almost never occur, noting that while it is at least "theoretical[ly] possible that the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site, . . . such [a] scenario 'seems unlikely in the real world.'" USCOC of Virginia RSA # 3 v. Montgomery County Board of Supervisors, 343 F.3d 262, 268 (4th Cir. 2001) (citation omitted).

land use approval "are so likely to be fruitless that it [would be] a waste of time even to try." Id. at 14.[7]

Approximately two months later, the Second Circuit adopted yet another formulation of the "effective prohibition" clause. Sprint Spectrum v. Willoth, 176 F.3d 630 (2nd Cir. 1999). While the Willoth court found that providers are not empowered by federal law to "construct any and all towers that, in [their] business judgment, [they deem] necessary to compete effectively with other telecommunications providers, wireless or not," id. at 639, the court did hold that "local governments must allow service providers to fill gaps" in their wireless networks, id. at 643. This requirement, however, was tempered by the holding that "[a] local government may reject an application for construction of a wireless service facility in an under-served area without [effectively] prohibiting personal wireless services if the service gap can be closed by less intrusive means." Id. (quoting Amherst, 173 F.3d at 14).

After Virginia Beach, Amherst and Willoth, the "effective prohibition" clause could be understood to impose upon local governments a duty to allow wireless providers at least some opportunity to close significant gaps in their networks, while at the same time requiring providers to demonstrate a very high level of diligence in ferreting out various alternative methods by which service might be provided in each

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[7] One of the "circumstances" that district courts may consider under the First Circuit rule is the extent to which a municipality has displayed a "fixed hostility" towards wireless facilities. See, e.g., Omnipoint Holdings v. Town of Westford, 206 F.Supp.2d 166, 172 (D.Mass. 2002).

such locality. The three tests nevertheless were substantially different, and none could be described as easy for a provider to satisfy.

After these three circuit court decisions, the Third Circuit issued a decision that shifted a tremendous amount of regulatory power to local governments by adopting the so-called "one provider" rule, which the court continues to follow and which thus forms the underpinning for the case that is the subject of the instant petition for certiorari. APT Pittsburgh Ltd v. Penn Township Butler Cty., 196 F.3d 469 (3rd Cir. 1999). In Penn Township, the Third Circuit agreed with the Second Circuit's requirement of a showing that the proposed facility "is the least intrusive means for closing a significant gap" in a wireless network. Id. at 480. The court, however, then added to that requirement a need for "evidence that the area [that] the [proposed] new facility will serve is not already served by another provider." Id.

Two weeks after Penn Township, the Third Circuit tipped the scale even more sharply in favor of municipalities. In Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999), the court expressly approved the notion that, when deciding issues concerning the placement of wireless infrastructure, local governments can evaluate the "quality" of a wireless network in order to "weigh the benefits of enhancing it against the possible costs" as long as this analysis was "authorized by and performed within the parameters of governing state and local law." Id. at 70. The court also held that in some cases, a community could exclude wireless facilities altogether, based upon

a showing of an "adequate level of services [provided by] facilities solely outside that community." Id. at 71.

The Third Circuit's "one provider" rule, first articulated in Penn Township and reiterated in subsequent cases, has not garnered any support in the other circuits. In Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002), the First Circuit had an opportunity to review this rule and soundly rejected it. The court wrote as follows:

> A flat "any service equals no effective prohibition" rule would say a town could refuse permits to build the towers necessary to solve any number of different coverage problems. It is highly unlikely that Congress intended the many qualitatively different and complex problems to be lumped together and solved by a rule for all seasons that any coverage in a gap area automatically defeats an effective prohibition claim .... The result would be a crazy patchwork quilt of intermittent coverage .... [S]uch a consequence was not, we think, the [result which Congress intended].

313 F.3d at 633.

The last circuit to weigh in on the "effective prohibition" clause was the Seventh. Voicestream Minneapolis Incorporated v. St. Croix County, 342 F.3d 818 (7th Cir. 2003). The court in that case agreed with the First Circuit's imposition of a burden upon providers to show that they have "investigated thoroughly the possibility of other viable alternatives." Id. at 834-35. The court's opinion also includes a lengthy footnote which criticizes the requirement of a showing of "least intrusive means" as "expounded by the Second and Third Circuits," id. at 835 n.8, but the court did not comment on the Third Circuit's "one provider rule."

The state of the law in the circuits which have addressed the effective prohibition clause can be summarized as follows. In the First and Seventh Circuits, a provider must show that it has a significant gap in coverage and that either that the only feasible alternative for closing that gap has been rejected, or that criteria are being applied which are impossible to meet. Second Generation Properties, 313 F.3d at 620; Voicestream Minneapolis Incorporated, 342 F.2d at 818. The test in the Fourth Circuit appears to be similar, although that court has stated on two occasions that it is skeptical that the absence of alternatives can ever be proven. See USCOC of Virginia RSA #3, 343 F.3d at 268. In the Second Circuit, a provider must show that the "least intrusive means" for closing a significant gap in coverage has been rejected. Finally, in the Third Circuit, a provider must show not only that "the least intrusive means" for closing a significant gap has been rejected but also that there are presently no other

wireless carriers providing service within that gap. Omnipoint Comm. Enter. v. Zoning Hearing Board of Easttown Township, 331 F.3d 386, 398-99 (3rd Cir. 2003).

## IV. The Third Circuit's Approach Impermissibly Tips The Balance Established By The "Effective Prohibition" Clause In Favor Of The Municipalities

In the case at bar, the Third Circuit had an opportunity to revisit its earlier holding in light of Second Generation Properties. In a two-to-one decision, the panel decided to continue its adherence to the so-called one-provider rule, notwithstanding the dissent of Judge Rosenn, who believed that the First Circuit rule, as enunciated in the Second Generation Properties case, should be followed.

The split among the Circuits, described above, raises a question of federal law which is of significant importance to the wireless telecommunications industry. Despite investments of billions of dollars in wireless infrastructure, the industry continues to be unable to keep pace with the ever growing demand for such services, in large part because municipalities continue to exercise strict control over the siting of wireless facilities. See Weiner Press Release, supra; see also Letter from Sen. Charles E. Schumer to Michael K. Powell, Chairman of the Federal Communications Commission, available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01332.html (November 24, 2002). Accordingly, the question is now squarely presented for this Honorable Court: does the so-called one-provider rule improperly limit competition among

wireless providers by tipping the balance of the competing interests too sharply in favor of local governments?

Nextel respectfully submits that the one-provider rule does, indeed, go much too far in protecting the legitimate interests of municipalities. Indeed, the rule plainly allows municipalities to pick and choose among the wireless carriers that might serve a given geographical area, thereby elevating local interests to the point where municipalities are given the power to veto the decision of a provider to service that particular market. The TCA was not intended to grant such broad regulatory power to municipalities.

There is, moreover, no other justification for the Third Circuit's test. As Judge Rosenn explained in his dissent, "the majority approach . . . threatens Congress' goal of promoting rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." Omnipoint Comm. Enter., 331 F.3d at 405.

Nor can the pro-competitive goals of the TCA be met under the Third Circuit's "one provider" rule merely because carriers can still argue that they were subjected to "unreasonable discrimination" in violation of another section of the TCA, 47 U.S.C. § 332 (c)(7)(B)(i)(I). See Penn Township Butler Cty., 196 F.3d at 408 n.8. As Petitioner explains, it is far too easy for a municipality to articulate some minor factor or other which differentiates one provider's proposed facility from a competitor's existing facility. Petition for Certiorari at 23-24. In short, under the one-provider rule, a provider who seeks to enter a market already

served by a competitor finds itself completely at the mercy of local officials. This is not what Congress intended, and it is not what the statute says.

## CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF *AMICI CURIAE* OF AT&T WIRELESS SERVICES, INC. AND CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, IN SUPPORT OF PETITIONER

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26 pp

## TABLE OF CONTENTS

**PAGE**

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

A. THE PETITION SHOULD BE GRANTED TO PROVIDE CLEAR GUIDANCE ON THE EFFECT OF THE PROHIBITION RESTRICTION ..... 5

B. THE STATUTORY AND REGULATORY FRAMEWORK ANTICIPATES APPLICATION OF THE PROHIBITION RESTRICTION ON A PROVIDER-BY-PROVIDER BASIS. ..... 12

C. THE ONE-PROVIDER RULE HAS THE EFFECT OF PROHIBITING SERVICES. ..... 15

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**CASES** **PAGE**

*360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*,
211 F.3d 79 (4th Cir. 2000) ..... 6

*APT Minneapolis, Inc. v. Eau Claire County*,
80 F. Supp. 2d 1014 (W.D. Wisc. 1999) ..... 10

*APT Pittsburgh Ltd. v. Penn Township*,
196 F.3d 469 (3d Cir. 1999) ..... 8

*AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,
155 F.3d 423 (4th Cir. 1998) ..... 6

*AT&T Wireless PCS, Inc. v. Town of Porter*,
203 F. Supp. 2d 985 (N. D. Ind. 2002) ..... 11

*Advanced Mobile Phone Serv., Inc. North-West Tel. Co. & GTE Mobilenet of Milwaukee, Inc.*,
No. 79-318, 1986 WL. 292526
(F.C.C. Jan. 6, 1986) ..... 13

*Airtouch Cellular v. City of El Cajon*,
83 F. Supp. 2d 1158 (S.D. Cal. 2000) ..... 10, 18

*Bellsouth Mobility, Inc. v. Parish of Plaquemines*,
40 F. Supp. 2d 372 (E.D. La. 1999) ..... 11

## TABLE OF AUTHORITIES
**(continued)**

**CASES** **PAGE**

*In re Cellular Communications Sys.*, 86 F.C.C.2d 469 (1981) *reh'g denied, Advanced Mobile Phone Serv., Inc. North-West Tel. Co. & GTE Mobilenet of Milwaukee, Inc.*, No. 79-318, 1986 WL. 292526 (F.C.C. Jan. 6, 1986)..... 13

*Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3d Cir. 1999)..... 4, 7, 8, 11, 16, 17

*Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003)..... 11

*MetroPCS v. San Francisco*, 259 F. Supp. 2d 1004 (N.D. Cal. 2003) ..... 10

*Nextel Comm. v. City of Cambridge*, 246 F. Supp. 2d 118 (D. Mass. 2003) ..... 18

*Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) ..... 8, 11

*Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan*, 62 F. Supp. 2d 691 (N.D.N.Y. 1999) ..... 11

*Omnipoint Comm. Enter. v. Easttown Tp.*, 319 F.3d 627 (3d Cir. 2003)..... 9, 12

## TABLE OF AUTHORITIES
**(continued)**

**CASES** **PAGE**

*Omnipoint Comm. Enter. v. Easttown Tp.*,
331 F.3d 386 (3d Cir. 2003) ..... 9, 10, 12

*Omnipoint Comm. Enter. v. Newtown Township*,
219 F.3d 240 (3d Cir.), *cert. denied*, 531 U.S. 985
(2000) ..... 15

*Second Generation Props., L.P. v. Town of Pelham*,
313 F.3d 620 (1st Cir. 2002) ..... 8, 9, 18

*Site Tech Group, Ltd. v. Town of Brookhaven BZA*,
140 F. Supp. 2d 255 (E.D.N.Y. 2001) ..... 8, 11

*Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County*,
59 F. Supp. 2d 1101 (D. Colo. 1999) ..... 11

*Sprint Spectrum, L.P. v. Willoth*,
176 F.3d 630 (2d Cir. 1999) ..... 7, 8

*Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc.*,
173 F.3d 9 (1st Cir. 1999) ..... 7, 17

*Voicestream Minneapolis, Inc. v. St. Croix County*,
342 F.3d 818 (7th Cir. 2003) ..... 7

## TABLE OF AUTHORITIES
(continued)

PAGE

### STATUTES

47 U.S.C. § 161 (a)(2) ..... 4
47 U.S.C. § 253 (a) ..... 13, 14
47 U.S.C. § 332 (a) ..... 15
47 U.S.C. § 332 (B) ..... 1, 4, 5, 13, 14
47 U.S.C. § 332 (c)(3)(A) ..... 14
47 U.S.C. § 332 (c)(7)(B)(i)(I) ..... 5
47 U.S.C. § 332 (c)(7)(B)(i)(II) ..... 1, 5
47 U.S.C. § 332 (c)(7)(B)(ii) ..... 5
47 U.S.C. § 332 (c)(7)(B)(iii) ..... 5
47 U.S.C. § 332 (c)(1)(C) ..... 4

### REGULATIONS

47 C.F.R. § 20.18 ..... 15

### SESSION LAWS

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 4, 16

Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 ..... 15

## TABLE OF AUTHORITIES
**(continued)**

**PAGE**

### CONGRESSIONAL AND REGULATORY REPORTS

Eighth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Service
F.C.C. 03-150 ..... 3

First Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Service
F.C.C. 95-317 ..... 3, 16

DALE HATFIELD, A REPORT ON TECHNICAL AND OPERATIONAL ISSUES IMPACTING THE PROVISION OF WIRELESS ENHANCED 911 SERVICES 15 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239 ..... 15

H.R. No. 104-204, *reprinted in* 1996 *Code Cong. & Admin. News,* at 61 ..... 4

H.R. Rep. 111, 103d Cong. 1st Sess. 261-62 (1993) ..... 15

*In re Revision of Rules to Ensure Compatibility With E911 ECS, Memorandum Opinion and Order,*
12 F.C.C.R. 22,665 (1997) ..... 15

*In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order,*
14 F.C.C.R. 10,954 (1999) ..... 15, 17

## INTEREST OF *AMICI CURIAE*

*Amici curiae* AT&T Wireless Services, Inc. and Cellco Partnership, d/b/a Verizon Wireless, through their subsidiaries and affiliates provide personal wireless services to approximately 60 million subscribers. The Courts of Appeals currently disagree on the proper interpretation of the section of the Telecommunications Act of 1996 ("TCA") proscribing actions of local authorities that have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332 (c)(7)(B)(i)(II) (2000) (the "prohibition restriction"). In particular, the "one provider" rule articulated by the Court of Appeals for the Third Circuit, which denies relief under the prohibition restriction if at least one other provider in an area are can provide service to *its* subscribers, has the paradoxical effect of denying personal wireless services to subscribers of other providers in that area.

The Third Circuit's interpretation of the prohibition restriction, if permitted to stand, would be detrimental to millions of *amici's* subscribers as well as subscribers of other providers.[1] The confusion surrounding the proper interpretation of the prohibition restriction also greatly complicates local zoning board consideration of thousands of applications for individual facilities and impedes *amici's* efforts to develop the nationwide facility networks necessary to provide the seamless, ubiquitous and reliable personal wireless services envisioned by Congress and the FCC.

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici curiae* and their members made any monetary contribution to the preparation or submission of this brief. All parties have given their consent in writing to the submission of this brief.

## SUMMARY OF ARGUMENT

This matter presents the question whether a personal wireless services provider can be denied the ability to provide services within its licensed service area because another provider already provides service in that area. Given Congress' stated goal to promote competition, reduce regulation, encourage rapid deployment of new telecommunications technologies and ensure availability of seamless, ubiquitous and reliable personal wireless services, the answer to this question must be "no."

In the TCA, Congress sought to preserve a local voice in facility siting while ensuring that parochial interests would not frustrate national telecommunications policy. The prohibition restriction seeks to ensure that the question addressed at the local level is not what services should be available but where the necessary facilities should be located. There is a significant split of opinion among the Courts of Appeals on interpretation of the prohibition restriction. As the statute in question governs individual decisions of local zoning boards, this split of opinion results in confusion and uncertainty in thousands of local land use application proceedings.

The one provider rule formulated by the Third Circuit denies providers and their subscribers the protection of the prohibition restriction if another provider already operates in the area to be served. This reading of the statute has been repudiated by the First Circuit and misinterprets the TCA to the detriment of the very consumers Congress sought to protect. For the prohibition restriction to have any efficacy it must be applied in a manner that permits each provider to secure approval of the facilities necessary to provide seamless, ubiquitous and reliable service to its subscribers.

## ARGUMENT

The explosive growth of personal wireless services[2] reflects an extraordinarily successful example of deregulation permitting market forces to drive the rapid deployment of new technologies of great public benefit. In the span of a decade, personal wireless services have transformed from a high-tech business tool available to a few into a mass-market consumer product that has become an integral part of American life.[3] Over 144 million Americans now subscribe to a personal wireless service, and it has been estimated that over 30% of calls previously transmitted by the land-line telephone network are now transmitted wirelessly.[4]

The key to this growth has been the persistence of Congress and the FCC in shielding personal wireless services from the potentially stultifying effects of state and local regulation. Even at the federal level, the FCC is

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[2] The term "personal wireless services" includes cellular, PCS, SMR and wireless data transmission. Technically, "cellular" is the regulatory term for the first personal wireless services licensed to exploit the then newly developed technology of a coordinated network of facilities using low-powered, limited range transmissions to provide mobile telecommunications. FIRST ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL SERV., FCC 95-317, at 13 [hereinafter FIRST ANNUAL REPORT]. PCS and SMR are functionally equivalent and technically similar services operating in slightly different frequency ranges.

[3] *See* FIRST ANNUAL REPORT, FCC 95-317 at 3 (describing personal wireless services in 1995 as a business tool serving 24 million customers). Emblematic of the speed with which this transition occurred, by 1997 a personal wireless services plan had been added to the Consumer Price Index's "basket" of goods and services. EIGHTH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL SERV., FCC 03-150, at 45 n.319 [hereinafter EIGHTH ANNUAL REPORT].

[4] EIGHTH ANNUAL REPORT, FCC 03-150 at 5, 49.

mandated by statute to conduct an annual review of competition in the personal wireless services industry, 47 U.S.C. § 332(c)(1)(C), and periodically review and eliminate regulations that have proven unnecessary due to the self-regulatory effects of market forces. 47 U.S.C. § 161(a)(2).

Despite widespread subscriber demand and the tremendous utility of personal wireless services, there is a long history of local hostility to the facilities necessary to provide service. Applications have been subject to interminable delays,[5] and are frequently denied for pretextual reasons in response to "not in my backyard" objections or unfounded concerns over radio emission safety. Congress recognized that such resistance threatened development of the facility networks necessary for efficient utilization of the radio spectrum dedicated to personal wireless services. Therefore, in the TCA, Congress expressly preempted certain conduct on the part of local authorities and subjected application denials to federal court review. *See* H.R. No. 104-204, at 94, *reprinted* in 1996 *Code Cong. & Admin. News*, at 61 ("Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.").

Of particular relevance to this appeal, the section of the TCA addressing prohibition of services provides that:

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[5] The most extreme example of such delay might be the application at issue in *Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3d Cir. 1999), which was the subject of 61 zoning board hearings over seven years before finally being approved and put in service in 2001.

> [t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-- ... *shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*

47 U.S.C. § 332(c)(7)(B)(i)(II) (emphasis added). [6]

By mandating that service be permitted, the prohibition restriction seeks to limit the issue addressed at the local level to determining where the facilities necessary for service should be located. It is incomprehensible that Congress, in a statute preempting local regulations that would have the effect of prohibiting the provision of personal wireless services, intended for that statute to be interpreted in a manner which places in the hands of local zoning officials ultimate control over the number of licensed providers servicing an area. That, however, is exactly the result of the Third Circuit's one provider rule.

### A. The Petition Should Be Granted to Provide Clear Guidance on the Effect of the Prohibition Restriction.

The prohibition restriction is in dire need of uniform interpretation. At present, the Courts of Appeals for the First, Second, Third and Fourth Circuits have all adopted

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[6] In addition to the prohibition restriction, §332(c)(7)(B)(ii) requires applications for facilities to be resolved in a reasonable period of time, §§(B)(iv) prohibits denials based on the environmental effects of radio frequency emissions that comply with emission regulations; §§(B)(i)(I) prohibits denials that unreasonably discriminate among providers of functionally equivalent services. Denial decisions must also be in writing and the state law substantive grounds for denial supported by substantial evidence. §§(B)(iii).

interpretations of the prohibition restriction that conflict with each other. This results in manifest confusion in district court and state court decisions, particularly in jurisdictions not bound to follow any of the existing standards. Because the prohibition restriction governs the validity of local zoning decisions, this uncertainty is particularly problematic. Over the course of a year, thousands of applications for such facilities will be brought before local zoning boards. These bodies, and the providers appearing before them, need to know the effect of the prohibition restriction on the applications before them. The current uncertainty complicates the application process, spawns litigation and impedes the development of the facility networks needed to provide seamless, ubiquitous and reliable service.

Providers and local boards have been frustrated by this uncertainty for years. In the earliest federal appellate decision addressing the prohibition restriction, the Court of Appeals for the Fourth Circuit formulated an unduly narrow standard, holding that an individual zoning decision could not violate the prohibition restriction since the provision applies only to blanket prohibitions. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998). Under this interpretation, which remains the most restrictive applied by any jurisdiction, the prohibition restriction has become a nullity except in those now-rare instances in which a local authority is impolitic enough to articulate an express ban.[7]

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[7] In *360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 87 (4th Cir. 2000), the Fourth Circuit suggested as a "theoretical possibility" that under an extreme set of facts, it *might* find something less overt than an express ban to give rise to a prohibition of service. The Fourth Circuit itself dismissed this possibility as "unlikely in the real world." *Id.*

All other Courts of Appeals that considered this issue have recognized that, since most regulation of land use occurs through decisions on individual applications, the prohibition restriction must apply to more than express bans. *See, e.g., Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003)(rejecting *Virginia Beach* standard). In *Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc.*, 173 F.3d 9 (1st Cir. 1999), the Court of Appeals for the First Circuit held that an individual denial could violate the prohibition restriction if the circumstances, viewed *de novo* by a reviewing court, demonstrated "such fixed hostility by the Board that one can conclude that further applications would be useless." *Id.* at 14.

Roughly contemporaneous with the *Amherst* decision, the Court of Appeals for the Second Circuit formulated a different standard. In *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999), the Second Circuit recognized that if a proposed facility was the least intrusive means of filling a gap in service, it could be presumed that if such an application was denied, any other application would meet the same fate, making the denial an effective prohibition in violation of the TCA. Both the First and Fourth Circuits have expressly rejected the least intrusive means element of the *Willoth* test.

The Court of Appeals for the Third Circuit, however, embraced the least intrusive means test and other aspects of *Willoth* in *Ho-Ho-Kus*, 197 F.3d at 70. There, the Third Circuit held that a gap exists when a subscriber using a hand-held phone is "unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication." *Id.* The Third Circuit suggested that a gap

would be significant where, due to its size, population density and/or traffic volume, the gap would impact a large number of subscribers. *Id.* at 70 n.2 (based on findings made *de novo* by the reviewing court. *Id.* at 71.).

In *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), however, the Third Circuit for the first time articulated the one provider rule and required that a prohibition claim "include evidence that the area the new facility will serve is not already served by *another* provider." *Id.* at 480 (emphasis added). The Third Circuit has never offered any justification for this rule based on statutory language or legislative intent. The rule instead is the product of misinterpretation of *dicta* in *Willoth* suggesting that "once an area is *sufficiently* serviced by a wireless service provider ... [s]tate and local governments may deny subsequent applications without thereby violating [the prohibition restriction]." *Willoth*, 176 F.3d at 643 (emphasis added). No explanation was given by the Third Circuit in *Penn Township* for insertion of the word "another" or deletion of the word "sufficiently" compared to the original language in *Willoth.*[8]

In *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002), the First Circuit conducted a thorough examination of the statutory language, legislative history and regulatory framework, and found that there was no justification for the one provider rule. In

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[8] Reported district court decisions in the Second Circuit have declined to follow *Penn Township* and do not read *Willoth* as adopting the one provider rule, *see, e.g., Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003); *Cf. Site Tech Group, Ltd. v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255, 263-65 (E.D.N.Y. 2001)(citing one provider rule as an alternate grounds for denial).

reaching this conclusion, the First Circuit stressed the counterproductive effect of the rule on subscribers:

> Such a rule would be highly problematic because it does not further the interest of the individual consumer. To use an example from this case, it is of little comfort to the customer who uses AT&T Wireless (or Voicestream, Verizon, Sprint or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap. Of course, that AT&T customer could switch to Cingular Wireless. But were that rule adopted, the same customer might well find that she has a significant gap in coverage a few towns over, where AT&T Wireless, her former provider, offers service but Cingular Wireless does not. *The result would be a crazy patchwork quilt of intermittent coverage....When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result.*

*Second Generation*, 313 F.2d at 633 (emphasis added).

Ironically, in *Omnipoint Comm. Enter. v. Easttown Tp.*, 319 F.3d 627 (3d Cir. 2003)(*Easttown Tp.* II), a panel of the Third Circuit initially rejected the one provider rule, noting that it was inconsistent with legislative intent, the relevant regulatory framework, and the *Willoth* decision from which it was derived. The panel's later withdrawal of this opinion relied solely on Third Circuit internal operating procedures binding individual panels to rulings contained in prior published opinions. *Omnipoint Comm. Enter. v. Easttown Tp.*, 331 F.3d 386, 396 (3d Cir. 2003)(*Easttown*

*Tp.* III). The Third Circuit's failure to offer any substantive justification for the one provider rule, either on reconsideration or in denying *en banc* review, is remarkable in light of the *Second Generation* decision and a vigorous dissent from Judge Rosenn stressing the flaws highlighted by the First Circuit. Indeed, it does not appear that *any* tribunal has *ever* advanced a substantive justification for the rule, which, by dint of repetition alone, has assumed a jurisprudential life of its own.

Lower courts looking for guidance have thus been confronted with a situation in which the First Circuit has rejected the Third Circuit's one provider rule and the Second Circuit's least-intrusive means test. The Fourth Circuit has rejected the Second and Third Circuit tests, and the First, Second, Third and Seventh Circuits in turn have rejected the Fourth Circuit's entire approach to interpretation of the prohibition restriction. The Third Circuit has adopted the Second Circuit's least intrusive means test, but has adopted the one provider rule, which the Second Circuit has not.

Not surprisingly, this conflict among the Courts of Appeals has resulted in an even greater difference of opinion among lower courts. In California, for example, one district court has embraced the one provider rule without reservation, *see Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1167-68 (S.D. Cal. 2000)(following *Penn Township*), while another has rejected that rule. *See MetroPCS v. San Francisco*, 259 F. Supp. 2d 1004, 1013-14 (N.D. Cal. 2003)(following *Second Generation*). Such disagreements have arisen time and again across the country. *See, e.g., APT Minneapolis, Inc. v. Eau Claire County*, 80 F. Supp. 2d 1014, 1025 (W.D. Wisc. 1999)(following *Amherst*); *Bellsouth Mobility, Inc. v. Parish of Plaquemines*, 40 F. Supp. 2d 372, 381 (E.D. La 1999)(following *Virginia*

*Beach*); *AT&T Wireless PCS, Inc. v. Town of Porter*, 203 F. Supp. 2d 985, 1001 (N.D. Ind. 2002)(following *Penn Township*); *Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan*, 62 F.Supp. 2d 691, 697 (N.D.N.Y. 1999)(following *Willoth*); *SiteTech Group, Ltd v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255 (E.D.N.Y. 2001)(following *Penn Township*); *Nextel v. Town of Amherst*, 251 F. Supp. 2d at 1195-96 (following *Second Generation* and rejecting *Penn Township*); *Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 419 (D. Vt. 2003)(rejecting *Penn Township*); *Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County*, 59 F. Supp. 2d 1101, 1109 (D. Colo. 1999)(following *Amherst*).

For local zoning boards, unless their own state courts of last resort have addressed this issue, *all* of the conflicting decisions discussed above represent persuasive authority. Some boards, concerned about denying an application entitled to approval on prohibition grounds, mandate that applicants prove the coverage of all providers in the area, a difficult, costly and time-consuming task.[9] Others, perhaps looking for a pretext to deny an application, have attempted

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[9] One problem of the one provider rule, as well as the middle ground advocated by the dissent below of determining prohibition based on a ratio of customers who cannot receive service compared to total customers, *Easttown Tp.* III, 331 F.3d at 401-02 (Rosenn, J. dissenting), is that the data necessary to make this calculation is either unavailable or proprietary. The flaws in Omnipoint's expert testimony criticized below in fact illustrate the difficulty of one provider attempting to measure the service of another. *Compare Easttown Tp.* III, 331 F.3d at 398 (describing efforts to judge service based on 80 calls made with a phone from another provider plugged into a laptop computer) *with Ho-Ho-Kus*, 197 F.3d at 69 (describing standard method of a provider measuring its own service based on thousands of calls monitored with specialized equipment). In addition, given that customers are by definition mobile, there is no reliable method of determining the number of a particular provider's customers inconvenienced by a specific gap.

to subpoena other providers to compel them to appear and prove that they have coverage. The extent to which federal telecommunications policy favors availability of services from all licensed providers also has potential relevance to public policy balancing tests under the zoning laws of some states. Doubt over what the prohibition restriction means complicates and protracts zoning hearings and leads to a great deal of litigation that might otherwise be avoided. Because personal wireless services technology depends on a large number of local sites, the delay and confusion caused by this uncertainty is compounded thousands of times a year in municipal halls across the country.

Omnipoint's petition presents an appropriate vehicle for remedying the uncertainty surrounding interpretation of the prohibition restriction. Resolving these questions would in turn remove a significant impediment to the ongoing development of providers' facility networks. Given the importance of this issue and the widespread confusion resulting from the conflicting judicial pronouncements, this Court should hear the instant case.

### B. The Statutory and Regulatory Framework Anticipates Application of the Prohibition Restriction on a Provider-By-Provider Basis.

The one-provider rule ignores the regulatory and legislative history of personal wireless services and frustrates the basic policy underlying the prohibition restriction. When the FCC licensed personal wireless services, it made a policy decision to reallocate scarce space in the electromagnetic spectrum to exploit the unique ability of this technology to meet increasing demand by subdividing cells and re-using frequencies, thereby increasing capacity without consuming

additional bandwidth. *In re Cellular Communications Sys.*, 86 F.C.C.2d 469, 474-82 (1981), *reh'g denied*, *In re Advanced Mobile Phone Serv., Inc. North-West Tel. Co. & GTE Mobilenet of Milwaukee, Inc.*, No. 79-318, 1986 WL 292526 (F.C.C. Jan. 6, 1986). Making a further deliberate judgment that this technology could best be made available through market forces, the FCC allocated sufficient bandwidth to license multiple providers in each area. *In re Cellular Communications Sys.*, 86 F.C.C.2d at 474-82.

Given Congress' presumed awareness of these cornerstones of personal wireless services regulation, it could not have intended the prohibition restriction to protect only one provider in an area. The FCC considered and rejected licensing schemes in which one provider would be deemed sufficient to service an area. *In re Cellular Communication Sys.*, 86 F.C.C.2d at 471-72. It therefore preempted state regulatory schemes that might have had the effect of permitting only one provider to provide service in an area. *Id.* at 505 ("requiring demonstration of a general public need for cellular service could adversely affect our frequency allocation or delay the rapid implementation of cellular service, both of which are central elements of the federal design for cellular operations.").[10] It also noted that "the inability of any cellular licensee to provide service could significantly inconvenience the public and cause a huge amount of spectrum to be unused," in contravention of the FCC's mandate to ensure efficient use of the electromagnetic spectrum. *Id.* at 502. Out of a conviction

[10] Other TCA provisions preempt state and local authorities from regulating market entry by personal wireless services providers, *see* 47 U.S.C. § 332(c)(3)(A), and prohibit state and local legal requirements that "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

that the then current availability of service from *two* providers was insufficient to provide the desired competition and availability of service, the FCC later reinforced this policy of multiple providers by reallocating further bandwidth to license an additional six PCS providers and at least one SMR provider per market area.

These policies were emphatically reaffirmed in the TCA, which reflects Congress' intent to promote competition and reduce regulation "in order to secure better prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies." TCA, Pub. L. No. 104-104, 110 Stat. 56. In the specific context of personal wireless services, Congress directed that regulation of this technology be guided by the desire to "improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users," and to "encourage competition and provide services to the largest feasible numbers of users[.]" 47 U.S.C. § 332(a)(2), (3). The one provider rule, by denying service to customers of certain providers and preventing the utilization of the providers' assigned spectrum in certain areas, is directly contrary to Congressional intent.

The one provider rule is also hostile to the primary goal of wireless telecommunications policy: to "promote the safety of life and property." 47 U.S.C. § 332(a)(1). In the years following enactment of the TCA, both Congress and the FCC, to ensure availability of 911 service to all personal wireless subscribers, have articulated a public policy in favor of "the construction and operation of seamless, ubiquitous, and reliable telecommunications systems" as a means to that end. Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999). *See also In*

*re Revision of Rules to Ensure Compatibility With E911 ECS, Memorandum Opinion and Order* 12 F.C.C.R. 22,665 (1997); 47 C.F.R. § 20.18; *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. 10,954, 10,962-63 ¶ 19 (1999)(mandating provision of 911 and E911 services).

Seamless, ubiquitous and reliable access to personal wireless 911 service for subscribers of all licensed providers is a planned by-product of the decision by Congress and the FCC to permit market forces to expedite network development. After the events of September 11, 2001, which demonstrated the robustness of such systems, public safety concerns have assumed even greater importance. *See* DALE HATFIELD, A REPORT ON TECHNICAL AND OPERATIONAL ISSUES IMPACTING THE PROVISION OF WIRELESS ENHANCED 911 SERVICES 15 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239. Over one-third of all 911 calls are now made from wireless phones. Related trends, including subscribers discontinuing land-line service, place an even greater premium on the availability of "seamless, ubiquitous and reliable" personal wireless systems as a means of providing 911 services. *Id.* The one provider rule clashes with these goals.

### C. The One-Provider Rule Has the Effect of Prohibiting Services.

The one-provider rule directly undermines the prohibition restriction's focus "upon the end result to the consumers and their reception of uninterrupted wireless telephone service." *Omnipoint Comm. Enter. v. Newtown Township*, 219 F.3d 240, 244 (3d Cir.), *cert. denied*, 531 U.S. 985 (2000). The fact that service is available to

subscribers of another provider is irrelevant to subscribers of the provider seeking to fill the gap. Subscribers of a provider without coverage in an area are "unable to connect with the land-based national telephone network or to maintain a connection capable of supporting a reasonably uninterrupted connection." *Ho-Ho-Kus*, 197 F.2d at 70 (defining elements of prohibition of service). The "end result" to these subscribers is that they cannot use their phones.

The implicit assumption of the one provider rule is that service by one provider in an area is sufficient. This assumption ignores the fact that, due to numerous factors, *subscribers of one provider cannot receive service through the facilities of another provider.* As a matter of federal policy favoring competition, in most areas there are competing providers for each type of personal wireless service. Cellular providers were originally required to utilize a common analog format, but were later permitted to shift most of their spectrum allocation to varying digital formats, reflecting the FCC's policy to encourage providers to adopt new technologies to respond to market demands. *See* FIRST ANNUAL REPORT, FCC 95-317 at 16. PCS and SMR use a variety of incompatible all-digital formats, including GSM, CDMA, TDMA, and IDEN. Driven by intense customer demand for more efficient wireless data transfer, a movement is already underway towards implementation of different third generation, or "3G" formats, with each carrier developing formats tailored to providing different mixes of services.

While there are isolated circumstances in which subscribers of one provider can access the network of another, these exceptions are sufficiently rare and difficult to implement that the FCC has dismissed the prospects of most

subscribers doing so as theoretical. *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. at 10,954-76 ¶¶3, 6, 21-26, & n.31, 35, n.47. Furthermore, even when possible, using another provider's network generally requires initiating a new call, obtaining operator assistance and use of a credit card. Not only is this practice cumbersome, it does not permit a subscriber to maintain a connection when moving between cells, an integral element of the definition of "service" utilized by the Second and Third Circuits. *See Ho-Ho-Kus*, 197 F.3d at 70.

In light of the importance Congress and the FCC have placed on making 911 service available to all subscribers, the Third Circuit's standard is particularly problematic. The assumption that it is permissible for municipalities to act in a manner that has the effect of rendering 911 service unavailable to customers of some providers poses a threat to public health and safety and is inconsistent with Congressional intent and the federal regulatory scheme. *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. at 10,962-63 ¶ 19 (1999)("The failure to deliver 911 calls because of coverage gaps can contribute to tragic outcomes in these emergency situations.").

Finally, as the First Circuit recognized in *Amherst*, 173 F.3d at 16, the prohibition restriction assumes particular importance when a denial that leaves a substantial gap in a provider's network is not subject to challenge under other

provisions of state or federal law.[11] It is common for local ordinances to exclude personal wireless facilities as permitted uses in areas in which facilities are needed to provide services. In addition, many states require a showing that a site is amenable to *no* permitted use as a condition for a use variance. Where, as is the case in Easttown Township, these two impediments coincide, it is *impossible* under state law to secure approval of a personal wireless facility, regardless of the need for the proposed facility.

If a necessary site cannot be approved under state law, relief under the TCA's substantial evidence provision is also unavailable, as that provision is governed by state substantive law. In such circumstances, if relief under the prohibition restriction is not available, *no relief is available.* The affected subscribers must simply do without service. As a result, they are deprived of the quintessential benefit of the Information Age revolution made possible by personal wireless services: mobility without sacrificing the ability to stay in contact. They lose the ability to make calls, summon emergency services, and, what is frequently most important, *the confidence that they can be reached by a call to the same number*, regardless of where they travel in their provider's service area.

In interpreting the prohibition restriction to *permit* prohibition of service to subscribers of other providers so

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[11] In particular, since land parcels are inherently unique and virtually *any* difference has been found sufficient to justify disparate treatment, the unreasonable discrimination provision has essentially become a dead letter. *See Second Generation*, 313 F.3d at 634-35 (questioning efficacy of discrimination provision). Indeed, it is not uncommon for discrimination claims to be rejected for applications to mount antennas on an existing structure on which another provider's facility is *already* located. *See, e.g., Nextel Comm. v. City of Cambridge*, 246 F. Supp. 2d 118 (D. Mass. 2003); *City of El Cajon*, 83 F. Supp. 2d 1158.

long as subscribers of one provider can receive service, the one provider rule misinterprets the TCA. It does so to the detriment of the very consumers Congress sought to protect.

Properly viewed, prohibition of services occurs whenever a provider is unable to secure approval of the facilities necessary for its customers to be able to rely on their ability to use their phones. It does not matter whether this inability is the result of an express ban, or a denial of a facility application for the only feasible location, or a denial under circumstances that would lead a reasonable person to conclude that all other applications would meet the same fate. The practical result to subscribers is the same: they cannot use their phones. For the prohibition restriction to have any efficacy, it must be applied in a manner that permits each provider to secure approval of the facilities necessary to provide seamless, ubiquitous and reliable service to its subscribers.

## CONCLUSION

For the reasons set forth above, AT&T Wireless Services, Inc. and Cellco Partnership, d/b/a Verizon Wireless respectfully request that the Petition for Writ of Certiorari of Omnipoint Communications Enterprises, L.P., be granted.

Respectfully submitted,

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